10

No. 00-1307-CFX Title: Jo Anne B. Barnhart, Commissioner of Social Security, Petitioner
v.
Sigmon Coal Company, Inc., et al.

Docketed:
February 14, 2001 Court: United States Court of Appeals for the Fourth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Feb 13 2001 | Petition for writ of certiorari filed. (Response due March 20, 2001) |
| | Feb 15 2001 | Order extending time to file response to petition until March 20, 2001. |
| | Mar 20 2001 | Brief of respondents Sigmon Coal Company, Inc., and Jericol Mining, Inc. in opposition filed. |
| | Mar 20 2001 | Motion of Trustees of UMWA Combined Benefit Fund for leave to file a brief as amicus curiae filed. |
| | Apr 2 2001 | Opposition of Respondents to motion of Trustees of UMWA Combined Benefit Fund for leave to file a brief as amicus curiae filed. |
| | Apr 4 2001 | DISTRIBUTED for Conference of April 20, 2001 |
| | Apr 5 2001 | Reply brief of petitioner Walter Halter, Acting Commr. of Social Security filed. |
| | Apr 23 2001 | Motion of Trustees of UMWA Combined Benefit Fund for leave to file a brief as amicus curiae GRANTED. |
| | Apr 23 2001 | Petition GRANTED.<br>SET FOR ARGUMENT November 7, 2001.<br>********** |
| | May 29 2001 | Order extending time to file petitioner's brief on the merits to and including June 21, 2001. |
| | Jun 21 2001 | Joint appendix filed. |
| | Jun 21 2001 | Brief of petitioner Larry Massanari, Acting Commissioner of Social Security filed. |
| | Jun 21 2001 | Brief amicus curiae of United Mine Workers of America filed. |
| | Jun 21 2001 | Brief amici curiae of Trustees of UMWA Combined Benefit Fund filed. |
| | Jun 21 2001 | LODGING consisting of twenty bound copies of related material submitted by counsel for the amici Trustees. |
| | Jul 23 2001 | Brief amicus curiae of Bellaire Corporation filed. |
| | Jul 24 2001 | Brief of respondents Sigmon Coal Co., et al. filed. |
| | Jul 24 2001 | Brief amicus curiae of R.G. Johnson Co., Inc. filed. |
| | Jul 24 2001 | Brief amicus curiae of USX Corp., et al. filed. |
| | Aug 8 2001 | Motion of the Solicitor General for divided argument and to allow United Mine Workers of of America Combined Fund leave to participate in oral argument as amicus curiae filed. |
| | Aug 14 2001 | Application (01A141) to extend the time to file a reply brief from August 27, 2001 to September 10, 2001 by Petitioner, submitted to The Chief Justice. |
| | Aug 15 2001 | Application (01A141) granted by the Chief Justice extending the time to file until September 10, 2001. |
| | Aug 16 2001 | CIRCULATED. |
| | Aug 22 2001 | Record filed. |
| | Aug 28 2001 | Supplemental brief of respondents filed. |

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No. 00-1307-CFX

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Sep 10 2001 | Reply brief of petitioner Larry G. Massanari, Acting Commissioner of Social Security filed. |
| | Sep 12 2001 | Record filed. |
| | Sep 24 2001 | Motion of the Solicitor General for divided argument and to allow United Mine Workers of America Combined Fund leave to participate in oral argument as amicus curiae DISTRIBUTED. |
| | Oct 1 2001 | Motion of the Solicitor General for divided argument and to allow United Mine Workers of of America Combined Fund leave to participate in oral argument as amicus curiae GRANTED. |
| | Nov 5 2001 | LODGING consisting of twenty copies of a letter and Fourth Circuit lodging submitted by the Solicitor General and distributed. |
| | Nov 7 2001 | ARGUED. |

Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

SIGMON COAL COMPANY, INC., AND JERICOL MINING, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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113pp

## QUESTION PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, established the United Mine Workers of America Combined Benefit Fund (Fund) to ensure the continued provision of health-care benefits to retired miners and their dependents who worked under collective bargaining agreements that promised lifetime health-care benefits. For the purpose of calculating premiums to be paid to the Fund to finance those health-care benefits, the Coal Act directs the Commissioner of Social Security to assign responsibility for beneficiaries of the Fund to the "signatory operator" or "related person" of the signatory operator that formerly employed them, if that signatory operator (or related person) is still "in business." 26 U.S.C. 9706(a).

The question presented is whether the Coal Act permits the Commissioner to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business.

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# In the Supreme Court of the United States

No.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

SIGMON COAL COMPANY, INC., AND JERICOL MINING, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 226 F.3d 291. The opinion and order of the district court (App., *infra*, 63a-64a, 65a-78a) are reported at 33 F. Supp. 2d 505. The orders of the Social Security Administration affirming the assignment of

responsibility for various individuals to respondents (App., *infra*, 45a-62a) are unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on August 29, 2000. A petition for rehearing was denied on November 15, 2000. App., *infra*, 81a-82a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISION INVOLVED**

Section 9701(c) of Title 26, United States Code, provides in pertinent part:

**Terms relating to operators**

For purposes of this section—

* * * * *

**(2) Related persons**

**(A) In general**

A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of [26 U.S.C. 52(a)]) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under [26 U.S.C. 52(b)]) with such signatory operator; or



(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person descibed in clause (i), (ii), or (iii).

**STATEMENT**

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, in response to a crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of promised lifetime health-care benefits. In the 1980s and 1990s, the financial stability of private multi-employer plans set up by the coal industry to finance those benefits was threatened by increasing health-care costs and the termination of employers' contribution obligations when they switched to non-union employees or left the coal mining business altogether. As more companies stopped contributing to the plans, the remaining contributors were forced to shoulder more of the costs, which in turn led to even more defections and created a downward spiral. See generally *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 504-514 (1998) (plurality opinion).

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry]

retirees," to "allow for sufficient operating assets for [coal industry retiree health-care benefit] plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19.42, 106 Stat. 3037. In furtherance of those ends, the Coal Act established the United Mine Workers of America Combined Benefit Fund (Combined Fund or Fund), a private multi-employer health benefit plan. The Combined Fund provides health-care benefits to beneficiaries who, at the time of passage of the Act, were receiving (or were eligible to receive) benefits from multi-employer plans established by collective bargaining in the coal industry. See 26 U.S.C. 9702, 9703(f). The Combined Fund is financed by premiums paid by the "signatory operator[s]" (or "related person[s]" of those signatory operators) that formerly employed the beneficiaries and that remain "in business." 26 U.S.C. 9704, 9706(a). The Act defines "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1). The particular collective bargaining agreements with the United Mine Workers of America (Union) governing the coal industry that are included within the term "coal wage agreement" are set forth in 26 U.S.C. 9701(b)(1).

b. The Act delegates to the Commissioner of Social Security[1] (Commissioner) the task of assigning eligible

[1] Many references in the legislative record are to the Department of Health and Human Services, which at the time included the Social Security Administration. In 1995, the Social Security Administration became an independent agency within the Executive Branch, and the Commissioner of Social Security assumed the duties of the Secretary of Health and Human Services under the Coal Act. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 108(h)(9)(A), 108 Stat. 1487.



beneficiaries to signatory operators or related persons. 26 U.S.C. 9706(a). Assignments are made according to a three-tiered hierarchy:

The Commissioner must first seek to assign a beneficiary to the "signatory operator" (or "related person") that remains "in business," signed a collective bargaining agreement with the Union in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for at least two years. 26 U.S.C. 9706(a)(1). The Act specifies that "a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. 9701(c)(7).

If an assignment of a particular beneficiary cannot be made under the first tier, the Commissioner must then attempt to assign the beneficiary to the signatory operator (or related person) that remains in business, signed a collective bargaining agreement with the Union in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for any period of time. 26 U.S.C. 9706(a)(2).

If an assignment cannot be made under the first or second tiers, the Commissioner must then seek to assign the beneficiary to the signatory operator (or related person) that remains in business and employed the miner in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 collective bargaining agreement. 26 U.S.C. 9706(a)(3).[2]

[2] In *Eastern Enterprises*, this Court struck down as unconstitutional an application of the third tier under which the Commissioner assigned a beneficiary to a coal mine operator that

If an assignment cannot be made under any of the three tiers, then the beneficiary is considered "unassigned," and his health-care benefits are funded with money transferred from interest earned on the Abandoned Mine Reclamation Fund, 26 U.S.C. 9705(b), or, if that source of funds is exhausted or unavailable, from an additional premium imposed on all assigned signatory operators in a *pro rata* fashion. 26 U.S.C. 9704(d). Congress understood that a principal cause of the financial instability of the multi-employer plans in existence before the Combined Fund was the problem of retirees whose employers had terminated their contribution obligations, and so it intended that the number of unassigned beneficiaries under the Coal Act be kept to "an absolute minimum." 138 Cong. Rec. 34,003 (1992) (technical explanation by Sen. Wallop).

Because the Commissioner must determine whether a beneficiary can be assigned to either a signatory operator *or* any related person to a signatory operator under one of these tiers before proceeding to the next tier, the concept of "related person" is central to the operation of the Act. The Act sets forth the following explication of the kinds of relationships between entities that shall lead the Commissioner to consider an entity to be a "related person" to a signatory operator:

> A person shall be considered to be a related person to a signatory operator if that person is—

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had not signed a collective bargaining agreement with the Union in 1974 or later. See 524 U.S. at 504 (plurality opinion); *id.* at 539 (opinion of Kennedy, J., concurring in the judgment and dissenting in part). The *Eastern Enterprises* decision is not directly relevant to this case, which does not involve assignments made under the third tier.



> (i) a member of the controlled group of corporations (within the meaning of [26 U.S.C.] 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under [26 U.S.C.] 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

26 U.S.C. 9701(c)(2)(A).

Although Congress expressly provided for assignments to be made to the successor in interest of a person "related" to the signatory operator, the statute does not state *in haec verba* that an assignment may be made to a direct successor in interest of the signatory itself. The Commissioner has concluded, however, that in light of the text, structure, and purposes of the Coal Act, Congress intended to reach those successors as well if the signatory operator is defunct and if there is no other "related person" to that operator. See Social Security Administration Supplemental Coal Act Review Instructions No. 4 (July 1995); App., *infra*, 83a-94a. The Commissioner has, in addition, concluded that a business should be deemed a successor in interest of a signatory operator or other related person if it has,

through purchase, merger, or other transaction, acquired substantial assets from the signatory or its related person, if it continues running the same operation in the same location, and if it uses many of the same employees who worked for the former owner. *Id.* at 86a.

c. When the Commissioner assigns a Combined Fund beneficiary to a signatory operator or related person, he so notifies the assigned operator, 26 U.S.C. 9706(e)(2), which then has 30 days to request "detailed information as to the work history of the beneficiary and the basis of the assignment," 26 U.S.C. 9706(f)(1). After receiving that information, the assigned operator has an additional 30 days to request review of the assignment decision. 26 U.S.C. 9706(f)(2). If, on review, the Commissioner determines that an assignment was incorrect, he rescinds the assignment and reviews the beneficiary's record to determine whether the beneficiary should be assigned to another operator. 26 U.S.C. 9706(f)(3)(A). If the Commissioner determines that there was no error in the assignment, he so notifies the assigned operator. 26 U.S.C. 9706(f)(3)(B).

3. In this case, the Commissioner assigned 86 beneficiaries of the Combined Fund to the Jericol Mining Corporation on the ground that Jericol was the successor in interest of a company that was the pertinent signatory operator. Those 86 beneficiaries are miners (or widows or dependents of miners) who had worked for the Shackleford Coal Company, a family-owned coal mining company located in Kentucky. In 1973, Irdell Mining, Inc., bought Shackleford's coal mining assets. App., *infra*, 10a. The sales contract provided that Irdell would assume responsibility for Shackleford's outstanding contracts, including its collective bargaining agreement with the Union. *Ibid.* Irdell also acquired



the right to use the Shackleford name. Shortly thereafter, the original Shackleford went out of business. Irdell, however, continued to operate Shackleford's mines under the existing collective bargaining agreement, using the name of Shackleford and using many of the original Shackleford's former employees. *Id.* at 10a-11a. While it was using the Shackleford name, Irdell signed the 1974 national coal wage agreement with the Union. *Id.* at 11a.

Shackleford eventually changed its corporate name to Jericol Mining, Inc., one of the plaintiffs in this action. App., *infra*, 11a. Jericol continued the coal mining operations that it had conducted under the Shackleford corporate name (*ibid.*) and retained the Employer Identification Number it had used to pay Social Security taxes for its employees under the Shackleford name. *Id.* at 47a.

4. In a series of assignment decisions made between 1993 and 1996, the Commissioner assigned Jericol 86 Combined Fund beneficiaries who were employed by (or who are widows or dependents of miners employed by) Shackleford. See C.A. App. 61-77, 96-124, 136-156. Jericol filed administrative appeals of those assignment decisions. *Id.* at 78-81, 125-135, 157-168. The Commissioner denied those appeals on the ground that Jericol is the successor in interest of Shackleford. App., *infra*, 45a-62a. In a representative decision, the agency explained:

> The sales contract [Jericol] submitted shows that Irdell Mining purchased the assets of Shackleford Coal, that Shackleford Coal was required to maintain the goodwill of its customers, allowed Irdell to use the name of Shackleford after the purchase, transferred responsibility for *all* outstanding con-

> tracts and agreements, and required that non-compete agreements be signed and submitted at the time of closing. You have also advised us that Irdell did conduct business under the Shackleford name and subsequently changed the company's name to Jericol Mining.

*Id.* at 48a-49a. The agency therefore concluded that Jericol is responsible for the Combined Fund premiums for retirees and their dependents who worked for Shackleford. *Id.* at 49a.

5. a. Respondents Jericol and Sigmon Coal Company, Inc., challenged the final administrative decisions in district court.[3] They argued that the Coal Act does not permit the Commissioner to assign Combined Fund beneficiaries to the direct successor in interest of a defunct signatory operator. The district court agreed, and granted respondents' motion for summary judgment. App., *infra*, 63a-78a.

b. The Commissioner appealed, and a divided panel of the court of appeals affirmed. App., *infra*, 1a-44a. The majority concluded that the Coal Act does not authorize the Commissioner to assign Fund beneficiaries to the direct successor in interest of a signatory operator that is no longer in business. The majority first rejected (*id.* at 24a-26a) the Commissioner's position that the text of the Coal Act's "related person" provision itself permits assignment to the direct

[3] The district court remarked that Sigmon appears to have joined Jericol as a plaintiff in this case because Sigmon is a "related person" to Jericol and thus is jointly and severally liable for premiums owed by Jericol. See App., *infra*, 66a n.3; see also 26 U.S.C. 9704(a) ("Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.").



successor of an original signatory. The Commissioner had pointed out that Section 9701(c)(2)(A) expressly authorizes assignments to the successor in interest of "any person described" in clauses of (i), (ii), or (iii) of 26 U.S.C. 9701(c)(2)(A), and had argued that the original signatory operator itself is one of the persons "described" in those provisions because each of the pertinent clauses in turn describes a group or family of related companies that expressly includes the signatory operator itself. The majority rejected that construction and concluded that the clauses defining "related person," read in context, identify only classes of persons that have a relationship to the signatory operator but do not include the signatory operator itself. App., *infra*, 24a-25a. Thus, the majority ruled, although the text of the Coal Act does expressly authorize an assignment to the successor in interest of a person related to a signatory operator, it does not expressly provide for an assignment to the direct successor in interest of the signatory operator itself. *Id.* at 25a-26a.

Second, the majority, expressly disagreeing with the decision in *R.G. Johnson Co.* v. *Apfel*, 172 F.3d 890 (D.C. Cir. 1999), rejected the submission that the Coal Act should be construed to permit assignments to direct successors in interest in order to avoid absurd results that would be inconsistent with the objectives of the statute. App., *infra*, 27a-32a. In *R.G. Johnson*, the District of Columbia Circuit sustained assignments to the direct successor in interest of a signatory operator after concluding that the failure to permit such assignments would frustrate Congress's intent to stabilize the financing of the Fund and to place responsibility for that financing on the businesses most responsible for plan liabilities. 172 F.3d at 895. The panel majority in the court below, however, concluded instead that

Congress might reasonably decide to promote sales of coal companies by shielding a direct purchaser of the signatory operator's assets from additional liabilities not contemplated in the original transaction. App., *infra*, 33a-34a. The majority did acknowledge some anomaly in a statutory scheme that expressly permits liability to attach to the successor to a person "related" to the original signatory while shielding from liability the direct successor of the original signatory itself (*id.* at 35a), as well as legislative history supporting the Commissioner's construction (*id.* at 30a-31a). But, the court concluded, "we are not simply free to ignore unambiguous language because we can imagine a preferable version." *Id.* at 34a.

c. Judge Murnaghan dissented. App., *infra*, 37a-44a. He agreed with the District of Columbia Circuit's decision in *R.G. Johnson* that a literal interpretation of the "related person" provision to exclude direct successors in interest of the signatory operator would conflict with Congress's clear purposes in enacting the Coal Act. *Id.* at 41a. Judge Murnaghan stressed that the Coal Act was intended to ensure that companies would not avoid responsibility for retirement benefits by structuring business transactions so as to dump retirement costs on other companies that remained bound to collective bargaining agreements, and that that objective would be frustrated if the obligation to pay statutory premiums could not also be placed on the direct successor of an original signatory. *Id.* at 41a-42a. Judge Murnaghan thus concluded that "[e]xcluding successors in interest to signatory operators from liability for Fund benefits is plainly inconsistent with Congress's intent in enacting the Coal Act." *Id.* at 44a.



The Commissioner filed a petition for rehearing en banc, which the court rejected by a vote of 7-2, with one judge not participating. App., *infra*, 81a-82a.

## ARGUMENT

This case presents the same question as that presented by *Aloe Energy Corp.* v. *Apfel*, petition for cert. pending, No. 00-725 (filed Nov. 2, 2000). As we have explained in our response to the petition for a writ of certiorari (at 10-13) in *Aloe*, the question whether a direct successor in interest of a signatory operator may be assigned responsibility for Combined Fund beneficiaries under the "related person" provisions of the Coal Act merits review by this Court. There is a conflict on that issue in the courts of appeals. Whereas the Fourth Circuit, in the decision below in this case, has concluded that the Coal Act does not permit the Commissioner to assign responsibility for Fund beneficiaries to such direct successors in interest, App., *infra*, 35a, the District of Columbia Circuit, in a directly contrary decision, has concluded that the Coal Act does authorize such assignments, *R.G. Johnson*, 172 F.3d at 895. The Third Circuit has joined the District of Columbia Circuit in an unpublished decision, see *Aloe Energy Corp.* v. *Apfel*, No. 99-3915 (June 20, 2000), petition for cert. pending, No. 00-725. The issue has also arisen in the First Circuit, which rejected the Commissioner's position in *Eastern Enterprises* v. *Chater*, 110 F.3d 150, 155 (1997), rev'd on other grounds, 524 U.S. 498 (1998). See also *Holland* v. *New Era Coal Co.*, 179 F.3d 397, 401 (6th Cir. 1999) (assuming without discussion that assignments may be made to the successor in interest of a signatory operator).

The validity of assigning statutory premium responsibilities to the direct successor in interest of an

original signatory operator is a matter of substantial importance to the proper operation of the Coal Act. The Commissioner's authority to assign beneficiaries of the Combined Fund to an out-of-business signatory operator's successor in interest is implicated in many assignment decisions.[4] A broader adoption of the Fourth Circuit's conclusion that no such authority exists could significantly undermine Congress's determination that corporate entities closely related to the signatory operator should be responsible for the signatory operator's obligations, and it could also jeopardize the Fund's financial stability. If the Commissioner may not assign responsibility for a signatory operator's employees to a direct successor in interest of that signatory, he will be required to assign responsibility to entities that are more distantly related to the signatory operator, such as other corporations within the same control group, or to more remote successors in interest to those related corporations (which, respondents acknowledge, would be a proper assignment under the Coal Act), or to persons at the next tier under the Act's three-tier framework. If no such entities exist, then the Commissioner must deem the beneficiaries to be "unassigned," in which case their health-care benefits must be financed by transfers from the Abandoned Mine Reclamation Fund or (if those transfers are insufficient) contributions from other

[4] We are informed by the Social Security Administration that about 16,500 beneficiaries have been assigned to entities deemed "related" to an original signatory operator under the Coal Act's "related person" provisions. Although the SSA has not conducted a manual search of its records to determine how many of those "related person" assignments were made on the basis of a direct successorship, the SSA believes that direct-successor assignments constitute a substantial proportion of those assignments.



former signatory operators, which did not employ them. Those possibilities are contrary to Congress's intent that financial responsibility for miners' benefits be placed on those entities most responsible for plan liabilities. The question presented herein therefore warrants review by this Court.

The issue is clearly framed by the earlier-filed petition in *Aloe*, and so we submit that *Aloe* is an appropriate vehicle for this Court's resolution of the question presented. Although *Aloe* arises from an unpublished decision of the Third Circuit, there is a conflict on the issue presented between published decisions of the Fourth and District of Columbia Circuits. We therefore suggest that the Court hold the petition in this case pending its disposition of *Aloe*, and that the petition then be disposed of as appropriate in light of the Court's disposition of *Aloe*.

## CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *Aloe Energy Corp.* v. *Apfel*, No. 00-725, and then disposed of as appropriate in light of the disposition of that case.

Respectfully submitted.

BARBARA D. UNDERWOOD
*Acting Solicitor General*

FEBRUARY 2001

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**No. 99-1219**

SIGMON COAL COMPANY, INCORPORATED;
JERICOL MINING, INCORPORATED,
PLAINTIFFS-APPELLEES

*v.*

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT-APPELLANT

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, AMICUS CURIAE

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Argued: Oct. 26, 1999
Decided: Aug. 29, 2000

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Before: MURNAGHAN, WILKINS, and TRAXLER, Circuit Judges.

Affirmed by published opinion. Judge TRAXLER wrote the majority opinion, in which Judge WILKINS joined. Judge MURNAGHAN wrote a dissenting opinion.

**OPINION**

TRAXLER, Circuit Judge:

Under the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act), *see* 26 U.S.C.A. §§ 9701-9722 (West Supp. 1998), the Commissioner of the Social Se-

curity Administration ("Commissioner") assigns fiscal responsibility for a retired coal miner's health benefits to the most appropriate coal mining company which employed the retired miner or, if the assigned coal operator is no longer in business, to an entity or individual that qualifies as a "related person" to the defunct coal company. *See* 26 U.S.C.A. § 9706(a). In 1993, the Commissioner assigned eighty-six retired coal miners to the Jericol Mining Company ("Jericol") on the basis that Jericol was a successor in interest to, and therefore a "related person" to, an out-of-business mining company that had employed the retired miners. The district court determined, based on a literal reading of the statutory text, that a successor in interest to a defunct signatory operator cannot be held accountable under the Coal Act as a "related person" and voided the Commissioner's assignments. *See Sigmon Coal Co. v. Apfel*, 33 F. Supp.2d 505, 508-11 (W.D. Va. 1998). The Commissioner appeals, contending that the district court's literal reading of the statute frustrates congressional intent to provide broad coverage for retired coal miners by identifying the "most responsible" employers, and that, in light of the general congressional purpose and various snippets of legislative history, we should read the statutory definition of "related person" to include a successor in interest to a signatory operator.

We decline the Commissioner's invitation to rewrite the Coal Act. The statute is clear and unambiguous, and we are bound to read it exactly as it is written. Accordingly, we affirm the decision of the district court.



## I.

### A.

The Coal Act of 1992 was passed in an effort to remedy a faltering system of healthcare benefits for the nation's retired coal miners. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 504-15, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998). On a handful of occasions, this court has carefully detailed the history of the coal industry's attempt to establish, through collective bargaining, an adequate system of health and retirement benefits for coal miners and the resulting labor unrest and financial instability which led to the Coal Act of 1992. *See Holland v. Big River Minerals Corp.*, 181 F.3d 597, 600-01 (4th Cir. 1999), *cert. denied*, —— U.S. ——, 120 S. Ct. 936, 145 L.Ed.2d 814 (2000); *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 738-39 (4th Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1127-29 (4th Cir. 1996). We need not recount the full history of the coal miners' health and retirement benefits system. Nevertheless, since the Coal Act incorporates specific benefit plans established by the coal wage agreements, consideration of the statutory scheme at issue requires at least a rudimentary understanding of these plans.

Between 1950 and 1978, a series of National Bituminous Coal Wage Agreements ("coal wage agreements") between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators Association ("BCOA") produced a number of multiemployer benefit plans. The 1950 coal wage agreement established a multiemployer fund to furnish health and retirement benefits for both coal miners and their dependents. *See Carbon Fuel*, 100 F.3d at 1127. Benefits under this fund, however, were determined at

the discretion of the trustees of the fund and were subject to reduction according to the fund's budget. *See Eastern Enterprises*, 524 U.S. at 506-08, 118 S. Ct. 2131. Thus, the miners were not guaranteed specific benefits.

In 1974, the UMWA and the BCOA entered into a coal wage agreement that expanded the benefits available under the 1950 coal wage agreement, creating four multiemployer plans to replace the 1950 fund:

> The 1974 [coal wage agreement] . . . divided the 1950 Plan into several separate multiemployer plans. It established a 1950 Pension Plan and Benefit Plan and a 1974 Pension Plan and Benefit Plan. The 1950 Benefit Plan provided health-care benefits to miners who retired prior to January 1, 1976, and their dependents. The 1974 Benefit Plan provided health-care benefits to miners who were active, or who retired on or after January 1, 1976, and their dependents.

*Carbon Fuel*, 100 F.3d at 1127. Significantly, the 1974 coal wage agreement promised, in contrast to the prior agreements, lifetime benefits. Signatory coal operators to the 1974 coal wage agreement pledged to finance both the 1950 Benefit Plan and the 1974 Benefit Plan, but their obligation to do so did not extend beyond the effective dates of the agreement. *See Eastern Enterprises*, 524 U.S. at 509-10, 118 S. Ct. 2131.

In 1978, the UMWA and the BCOA again reorganized the health-care benefit system for coal miners, this time moving toward decentralization. Under the 1978 coal wage agreement, a coal miner retiring on or after January 1, 1976, would be provided benefits by his last employer pursuant to an individual employer plan. The



1974 Benefit Plan continued to exist, but only to cover miners, known as "orphans," who had retired on or after January 1, 1976, and whose last employer was no longer participating in the multiemployer plans or had gone out of business. Likewise, the 1950 Benefit Plan would continue to afford benefits to miners who had retired prior to January 1, 1976 and their dependents. *See Carbon Fuel*, 100 F.3d at 1127. There were two other noteworthy features of the 1978 coal wage agreement. First, the agreement required signatory operators to provide defined benefits rather than defined contributions as under previous agreements. *See Holland*, 181 F.3d at 600-01. Second, the agreement included an "evergreen" clause requiring signatories to continue contributing even if they did not sign a subsequent agreement, as long as they remained in the coal industry. *See Eastern Enterprises*, 524 U.S. at 510, 118 S. Ct. 2131.

The series of coal wage agreements and the numerous restructurings to the coal miners' health benefit system effected by the coal wage agreements occurred against a backdrop of severe financial distress. By the latter part of the 1980s, the 1950 and 1974 Benefit Plans were facing the possibility of insolvency as many signatories to the 1978 coal wage agreement left the coal mining business, sending their retirees—now newly orphaned—back into the multiemployer 1974 Benefit Plan. An increasingly small number of signatories shouldered the burden of funding the plan, which was providing healthcare benefits—the cost of which were rising—for a growing number of orphaned retirees. *See id.* at 511, 118 S. Ct. 2131; *Carbon Fuel*, 100 F.3d at 1127. These factors, among others, created a vortex which simultaneously decreased funds and

increased beneficiaries, and threatened to undo the whole system.

The dire financial state of the 1950 and 1974 Benefit Plans ultimately spurred a lengthy strike in 1989 at the Pittston Coal Company, which, in turn, prompted the creation of the Advisory Commission on United Mine Workers of America Retiree Health Benefits ("Coal Commission") to devise a solution to the problem of health benefits for retired miners. Following the submission of recommendations by the Coal Commission, Congress passed the Coal Act of 1992.

**B.**

The Coal Act of 1992 established two new multi-employer health benefit funds. The first of these, the United Mine Workers of America Combined Benefit Fund ("the Combined Fund"), resulted from the merger of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. *See* 26 U.S.C.A. § 9702(a)(2). In general terms, the Combined Fund provides health benefits to retired miners (or their dependents) who were eligible to receive benefits from the 1950 or the 1974 Plan and were receiving benefits as of July 20, 1992. *See* 26 U.S.C.A. § 9703; *see also Eastern Enterprises*, 524 U.S. at 514, 118 S. Ct. 2131; *Holland*, 181 F.3d at 601. The second fund established by the Coal Act, the UMWA 1992 Benefit Plan, provides health benefits "to any eligible beneficiary who is not eligible for benefits under the Combined Fund." 26 U.S.C.A. § 9712(b)(1).[1]

[1] Thus, the UMWA 1992 Benefit Plan covered retired miners who were eligible for but were not drawing benefits under the 1950 or 1974 UMWA Benefit Plans and who were also not receiving benefits under an individual employer plan. *See Holland*, 181 F.3d at 601.



We are concerned here only with the Combined Fund.[2]

The Coal Act charges the Commissioner with assigning responsibility under the Combined Fund for each eligible retiree to an appropriate coal industry employer. The Commissioner is required, pursuant to a three-tiered priority scheme, to pair each retiree "to a signatory operator which (or any related person with respect to which) remains in business." 26 U.S.C.A. § 9706(a). An assigned signatory operator must pay an annual premium to the Combined Fund based largely on the number of beneficiaries assigned to it. *See* 26 U.S.C.A. § 9704. A "signatory operator" is "a person which is or was a signatory to a coal wage agreement." 26 U.S.C.A. § 9701(c)(1). For purposes of the Coal Act, a signatory operator "remains in business" if it "conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C.A. § 9701(c)(7).

In assigning retirees to signatory operators, the Commissioner must observe the following priority scheme:

(1) First, to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

[2] The Coal Act also required coal operators to continue the individual employer plans established under the 1978 coal wage agreement or a subsequent coal wage agreement. *See* 26 U.S.C.A. § 9711.

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C.A. § 9706(a)(1)-(3).

Even if there are no signatory operators that remain in business to whom a retiree can be assigned, responsibility for the retiree's Combined Fund benefits may still be attached to anyone qualifying as a "related person" to a signatory operator that would have been responsible for benefits had it remained in business. *See* 26 U.S.C.A. § 9704(a) ("Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by



such operator."). The Coal Act defines a "related person" as follows:

(2) Related Persons.—

(A) In general.—A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of section 52(a) [of the Internal Revenue Code]) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b) [of the Internal Revenue Code]) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

26 U.S.C.A. § 9701(c)(2)(A). According to the language of the statute, even if the signatory operator and its related persons are defunct, coverage for the retiree can be assigned to a "successor in interest" to a related person. The term "successor in interest," however, is

left undefined by the Coal Act. A related person or its successor in interest is not liable for Combined Fund premiums unless the related person was related as described in section 9701(c)(2)(A) "as of the time immediately before such operator ceased to be in business." 26 U.S.C.A. § 9701(c)(2)(B).

In the event there is no signatory operator or related person remaining in business, and there is no successor in interest to any entity that is "related" to a signatory operator within the meaning of section 9701(c)(2)(A), then the retiree or his dependents are unassigned but not uncovered. The Coal Act requires the assigned signatory operators to cover the benefits for the unassigned miners on a pro rata basis. *See* 26 U.S.C.A. § 9704(d). The premiums paid on behalf of the unassigned miners' benefits are reduced by the transfer of funds from the Abandoned Mine Land Reclamation Fund (the "AML Fund"). *See* 26 U.S.C.A. § 9705(b); 30 U.S.C.A. § 1232(h) (West Supp. 1998).

C.

In 1973, Irdell Mining, Incorporated ("Irdell") bought the coal mining operating assets of the Shackleford Coal Company ("Shackleford"), a family-owned coal mining company in Kentucky. There was no common ownership between Irdell and Shackleford. According to the terms of the asset purchase agreement, Irdell assumed responsibility for Shackleford's contractual and lease arrangements, including the collective bargaining agreement with the United Mine Workers. Otherwise, Irdell did not assume Shackleford's liabilities. Following the sale of assets, Shackleford changed its name to Kelly & Associates, which dissolved shortly after the sale. For several years after the sale, Irdell used the



Shackleford name, which it was permitted to do pursuant to the asset purchase agreement. Eventually, it changed its name to Jericol Mining Company. It is undisputed that Jericol continued Shackleford's coal operations, using many of Shackleford's employees. Jericol, while it was using the Shackleford name, signed the 1974 coal wage agreement that expired in 1977. Jericol did not sign any subsequent agreements.

From September 1993 to September 1997, the Commissioner assigned to Jericol, in piecemeal fashion, eighty-six coal miners who had retired from Shackleford and qualified as Combined Fund beneficiaries. These retirees worked for Shackleford, but they retired prior to the asset sale and thus never worked for Jericol. The Commissioner's original notice of assignment to Jericol explained that these retirees were assigned on the basis that Jericol was a "related person" to Shackleford, a signatory operator that would have been the assignee had it not been defunct:

> Our records and UMWA records indicate that you are related to the signatory operator named below [Shackleford] who is no longer in business. This operator would have been responsible under the law for the miner named below under the rules for how we assigned responsibility. . . . Therefore, as a related company you must assume responsibility.

J.A. 64. Jericol requested that the Commissioner reconsider the assignment, disputing that it was a "related person" to Shackleford within the meaning of the Coal Act. The Commissioner reaffirmed the series of assignments of Shackleford's retirees to Jericol, however, indicating that Jericol was responsible as a "successor in interest" to Shackleford. In confirming his

decision, the Commissioner provided Jericol with a number of written explanations which were substantially identical:

> While Jericol admits purchasing part of Shackleford's assets in 1973, the company maintains it was not a successor in interest. However[,] Jericol adopted use of the Shackleford name, continued to operate under Shackleford's UMWA agreement and otherwise acted as its successor. Therefore Jericol is Shackleford's successor. Shackleford was the last coal company to empioy the miner. Since Shackleford is a pre-78 signatory and employed the miner for more than 24 months the assignment must be made under category three. Shackleford employed the miner longer than any other coal company that is still active or has an active related company. Therefore the original assignment was correct.

J.A. 94.

Jericol then brought this action, seeking a determination that it is not responsible for the Shackleford retirees. The district court concluded that under section 9701(c)(2)(A), a successor in interest to a defunct signatory operator (assuming Shackleford is one) cannot be held accountable as a "related person" to that signatory operator, reasoning that because Jericol did not succeed to any person described in clauses (i), (ii), or (iii) of section 9701(c)(2)(A), it did not qualify as a "related person" to Shackleford under the unvarnished terms of the statute. *See Sigmon Coal*, 33 F. Supp.2d at 510. The Commissioner argued that, regardless of the language of the statute, the court should read the definition of "related person" to include a successor in interest to a signatory operator because, when applied



literally, the statute leads to results that are absurd or, at the very least, much different from what Congress intended. The district court rejected this argument, finding the meaning of the statute clear on its face. *See id.* at 510-11. Thus, the district court held that the clear and unambiguous language obviated the need for it to defer to the Commissioner's interpretation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). The Commissioner then brought this appeal.

## II.

First, we must determine whether we have subject matter jurisdiction to reach the substantive issues raised in this appeal. The parties did not raise this issue in either their briefs or at oral argument. Subsequently, the Commissioner, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, raised the possibility that the district court lacked jurisdiction under *Pittston Co. v. United States*, 199 F.3d 694 (4th Cir. 1999), a decision that was issued following oral argument in this case.

We are duty-bound to clarify our subject matter jurisdiction even if the parties do not develop it as an issue. *See Cook v. Georgetown Steel Corp.*, 770 F.2d 1272, 1274 (4th Cir. 1985) ("Although plaintiffs have not questioned the district court's jurisdiction, lack of subject matter jurisdiction is an issue that requires sua sponte consideration when it is seriously in doubt."). Unlike personal jurisdiction, subject matter jurisdiction cannot be waived. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704, 102 S. Ct. 2099, 72 L.Ed.2d 492 (1982). Accordingly, we

must address the basis of our jurisdiction even when the parties do not pursue the topic of subject matter jurisdiction full bore. *See United States v. White*, 139 F.3d 998, 999-1000 (4th Cir.), *cert. denied*, 525 U.S. 933, 119 S. Ct. 343, 142 L.Ed.2d 283 (1998).

Thus, we directed the parties to submit supplemental briefs on the following question:

> Whether, in light of this court's holding that Coal Act premiums are taxes, *see Pittston Co. v. United States*, 199 F.3d 694, 701-03 (4th Cir. 1999); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.* (*In re Leckie Smokeless Coal Co.*), 99 F.3d 573, 583 (4th Cir. 1996), and the federal courts' lack of jurisdiction to consider "suit[s] for the purpose of restraining the assessment or collection of any tax," 26 U.S.C.A. § 7421(a) . . . , the court has jurisdiction over this action.

The parties submitted supplemental briefs, and we now address the district court's subject matter jurisdiction.

**A.**

The Anti-Injunction Act, *see* 26 U.S.C.A. § 7421(a) (West Supp. 2000), and the tax-exclusion provision of the Declaratory Judgment Act, *see* 28 U.S.C.A. § 2201(a) (West 1994), reflect "[t]he congressional antipathy for premature interference with the assessment or collection of any federal tax." *Bob Jones University v. Simon*, 416 U.S. 725, 732 n. 7, 94 S. Ct. 2038, 40 L.Ed.2d 496 (1974). The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the



person against whom such tax was assessed." 26 U.S.C.A. § 7421(a). The Act has two primary objectives: "efficient and expeditious collection of taxes with 'a minimum of pre-enforcement judicial interference,' and protection of the collector from litigation pending a refund suit." *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 12, 95 S. Ct. 13, 42 L.Ed.2d 7 (1974) (per curiam) (quoting *Bob Jones*, 416 U.S. at 736-37, 94 S. Ct. 2038). Unless an exception to the Anti-Injunction Act applies, "the legal right to the disputed sums [must] be determined in a suit for a *refund*." *Bob Jones*, 416 U.S. at 736 (emphasis added) (internal quotation marks omitted).

The Declaratory Judgment Act provides that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration" unless the action seeks a declaration of rights or legal relations "*with respect to Federal taxes*." 28 U.S.C.A. § 2201(a) (emphasis added). Even "[t]hough the Anti-Injunction Act concerns federal courts' subject matter jurisdiction and the tax-exclusion provision of the Declaratory Judgment Act concerns the issuance of a particular remedy, the two statutory texts are, in underlying intent and practical effect, coextensive." *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.* (*In re Leckie Smokeless Coal Co.*), 99 F.3d 573, 583 (4th Cir. 1996).

In *Leckie*, we concluded that, for purposes of the Anti-Injunction Act and the tax-exclusion provision of the Declaratory Judgment Act, Coal Act premiums are taxes. *See Leckie*, 99 F.3d at 583; *see also Pittston*, 199 F.3d at 702. Thus, any action that can be construed as

having "the purpose of restraining the assessment or collection" of Coal Act premiums, *i.e.*, taxes, potentially strips us of jurisdiction under the Anti-Injunction Act and runs afoul of the tax-exclusion provision of the Declaratory Judgment Act.

However, "the Anti-Injunction Act 'was not intended to bar an action where . . . Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax.'" *Leckie*, 99 F.3d at 584 (ellipsis in original) (quoting *South Carolina v. Regan*, 465 U.S. 367, 370-71, 104 S. Ct. 1107, 79 L.Ed.2d 372 (1984)). *Leckie* involved an effort by bankrupt coal operators to secure a declaration from the bankruptcy court that the purchasers of their assets would not be liable for Coal Act premiums as successors in interest to the bankrupt coal operators. We concluded that the bankrupt coal operators "[did] not have any 'alternative legal way' to challenge the imposition of Coal Act successor liability on the purchasers of their assets." *Id.* The *Leckie* operators "need[ed] to know whether they [could] sell their assets free and clear of liability for their Coal Act premiums," *id.*, that is, they were challenging Coal Act premiums on potential purchasers, not their own Coal Act liability. The Anti-Injunction Act and the Declaratory Judgment Act therefore did not preclude the *Leckie* court from considering the merits because "the Coal Act [does not] provide any means by which a coal operator can challenge the imposition of successor liability on a third party." *Id.*

In *Pittston*, we considered whether it was proper for coal operators to assert a constitutional challenge to premiums they were required to pay under the Coal Act via a tax refund action against the United States.



*See Pittston*, 199 F.3d at 699. Rejecting the idea that the Coal Act provides the exclusive procedure by which a coal operator can obtain a refund of premiums paid on behalf of an incorrectly assigned retiree, we held that "a tax refund action is an appropriate vehicle for Pittston to use to seek recovery of . . . Coal Act premiums." *Pittston*, 199 F.3d at 704. In doing so, we underscored our holding in *Leckie* that Coal Act premiums are taxes. *Id.* at 702. The coal operators in *Pittston*, however, sought no injunctive or declaratory relief; they simply sought a refund of their Coal Act premiums.

**B.**

Jericol's action against the Commissioner includes a request for both declaratory and injunctive relief. The complaint seeks an order (1) declaring "that neither Jericol nor Sigmon is a successor in interest to Shackleford within the meaning of 26 U.S.C. § 9701(c)(2)(A)," J.A. 13, (2) "enjoin[ing] the Commissioner from assigning any Shackleford retirees to [Jericol] in the future," J.A. 14, and (3) "direct[ing] the Commissioner to (i) withdraw the assignment of Shackleford's retirees to Jericol, and (ii) inform the Combined Fund that such assignments have been withdrawn," J.A. 13. In its complaint, Jericol asserted that three specific statutory bases vested the district court with subject matter jurisdiction: the Declaratory Judgment Act; the Administrative Procedures Act ("APA"); *see* 5 U.S.C.A. § 704 (West 1996); and sections 9706 and 9721 of the Coal Act. Jericol has not paid the Coal Act premiums on behalf of the retirees whom Jericol claims were improperly assigned to it.

The Commissioner contends that the Anti-Injunction Act and the Declaratory Judgment Act deprived the

district court of authority to consider Jericol's action. According to the Commissioner, the relief that Jericol seeks—an order requiring the Commissioner to withdraw assignments made to Jericol—would have the eventual effect of preventing the collection of Coal Act taxes because "[i]t is . . . the Comissioner's assignment of a beneficiary to an operator that gives rise to that operator's liability for premiums under the [Coal] Act." Supplemental Brief of Appellant at 5. The Commissioner contends that, even if Jericol's action does not directly impede the collection or assessment of taxes, this action is aimed at restraining a preliminary step to the actual collection of Coal Act premiums and thus falls within the purview of the Anti-Injunction Act. *See Bob Jones*, 416 U.S. at 731-32, 94 S. Ct. 2038; *Clark v. United States* (*In re Heritage Church & Missionary Fellowship*), 851 F.2d 104, 105 (4th Cir. 1988) (per curiam). And, argues the Commissioner, unlike the coal operators in *Leckie*, Jericol has several alternative means of challenging the assignment of the retirees, depriving the district court of subject matter jurisdiction. *See Leckie*, 99 F.3d at 584. Having carefully considered the supplemental briefs of the parties and the *Amicus Curiae*, we conclude that neither *Leckie* nor *Pittston* precluded the district court from exercising jurisdiction.

The Coal Act itself provides a specific scheme for coal operators such as Jericol to challenge the assignment of retirees by the Commissioner under section 9706. Section 9706(f) prescribes a procedure for obtaining administrative review of beneficiary assignments by the Commissioner and contemplates that the administrative procedure will be subject to judicial review. First, an assigned operator that is dissatisfied with an



assignment may "request from the Commissioner . . . detailed information as to the work history of the beneficiary and the basis of the assignment." 26 U.S.C.A. § 9706(f)(1). If an examination of this material does not persuade the assigned operator that the assignment was appropriate, the operator may then request review of the assignment by the Commissioner who "shall conduct such review if . . . the operator provided evidence with the request constituting a prima facie case of error." 26 U.S.C.A. § 9706(f)(2). Regardless of whether the Commissioner ultimately determines that the assignment was or was not in error —or that assigned operator did or did not present a prima facie case of error—the "determination by the Commissioner . . . under paragraph (2) or (3) shall be final." 26 U.S.C.A. § 9706(f)(4). The final decision of the Commissioner is subject to review "by a court under this subsection." 26 U.S.C.A. § 9706(f)(5). As a final agency decision, the review process is governed by the APA. *See* 5 U.S.C.A. § 704; *Dixie Fuel Co. v. Commissioner of Social Security*, 171 F.3d 1052, 1057-58 (6th Cir. 1999) (applying APA review to Commissioner's assignment of beneficiaries in an action for injunctive relief); *Lindsey Coal Min. Co. v. Chater*, 90 F.3d 688, 691 (3rd Cir. 1996) (applying APA review to Commissioner's assignment of beneficiaries in an action seeking declaratory relief). Of course, the APA is not an independent grant of subject matter jurisdiction to the federal courts. *See Califano v. Sanders*, 430 U.S. 99, 107, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977). Rather, 28 U.S.C.A. § 1331 serves as the jurisdictional basis for federal courts "to review agency action." *Id.* at 105, 97 S. Ct. 980. The Coal Act clearly anticipates that this review scheme will apply to the Commissioner's assignment of beneficiaries and that, accordingly, a district

court will have the power to review such assignment and issue appropriate relief.

Here, unlike *Leckie*, the assigned operator is simply following a procedure mapped out in the Coal Act specifically for this situation. *See Leckie*, 99 F.3d at 584. The coal companies in *Leckie* were not seeking review of the Commissioner's assignments, as specifically permitted in the statute; rather, they were seeking a declaration with respect to Coal Act liabilities of a third party, a question for which there was no adequate remedy under the Coal Act or outside of it. (For example, the *Leckie* coal operators could not seek relief under 26 U.S.C.A. § 7422.) *See id.* (noting that "the Coal Act itself [does not] provide any means by which a coal operator can challenge the imposition of successor liability on a third party").

This distinction is pivotal. "It is a basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." *Farmer v. Employment Sec. Comm'n of North Carolina*, 4 F.3d 1274, 1284 (4th Cir. 1993). Thus, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L.Ed.2d 540 (1976) (internal quotation marks omitted). Congress has expressly provided a method for coal operators to obtain review of the assignment of beneficiaries under section 9706(a). Because the Coal Act specifically addresses this issue, we conclude that the Coal Act, not the more general Anti-Injunction Act, controls the jurisdictional analysis.



Nevertheless, the Commissioner contends that the language of section 9706(f)(5) supports the argument that the Anti-Injunction Act applies because section 9706 creates, if anything, only a "post-payment remedy." Section 9706(f)(5) provides that "[a]n assigned operator shall pay the premiums under section 9704 *pending review* by the Commissioner of Social Security or by a court under this subsection." The Commissioner submits that this language is more consistent with a tax refund action than with an action for injunctive or declaratory relief, and supports the policy of the Anti-Injunction Act to facilitate the collection of tax revenue. At bottom, the Commissioner is arguing that the phrase "pending review" created a jurisdictional barrier for the district court.

We are not convinced. First, the language of the statute does not indicate or imply that the district court is deprived of jurisdiction to review the Commissioner's assignments unless the assigned premiums have first been paid. And, we do not perceive section 9706(f)(5) to preclude the possibility of declaratory or injunctive relief. Indeed, Jericol could seek precisely the same type of relief it now seeks whether or not it paid its premiums pending review. Second, the structure of section 9706(f) suggests otherwise. The requirement that the assigned operators pay their premiums "pending review . . . by a court" applies just as forcefully "pending review by the Commissioner of Social Security." But, the statute makes clear that this is not a prerequisite to review by the Commissioner who "*shall* conduct such review if the Commissioner finds . . . a prima facie case of error." 26 U.S.C.A. § 9706(f)(2) (emphasis added). Nothing in the language of the statute indicates that Congress meant for the

phrase "pending review" to apply differently to review by a court. Third, the Coal Act provides an incentive to make timely premium payments to the Combined Fund in that it imposes penalties for failure to do so. *See* 26 U.S.C.A. § 9707. Consequently, the requirement that assigned operators pay their premiums pending review is not a hollow provision.

We likewise believe that *Pittston* is a different case from the one before us and does not curtail the jurisdiction of a district court in an action simply challenging the Commissioner's assignment of beneficiaries under section 9706(a). We say this primarily because we were not required in *Pittston* to address the applicability of the Anti-Injunction Act or the tax-exclusion provision of the Declaratory Judgment Act. *Pittston* held that a tax refund action was "an appropriate vehicle" for a coal operator that was seeking the repayment of Coal Act premiums based on its contentions that (1) the Coal Act violated a number of constitutional principles as applied; and (2) the premiums had been improperly calculated. *See Pittston*, 199 F.3d at 699. Thus, nothing in *Pittston* precludes the exercise of jurisdiction in an action like this one.[3]

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[3] Moreover, we note that the premium miscalculation claim in *Pittston* does not appear to be a claim that even fits under section 9706(f). The review procedures set forth in section 9706(f) are confined specifically to the *assignment* of Coal Act beneficiaries to signatory operators or their "related persons." *See* 26 U.S.C.A. § 9706(f)(2) ("An assigned operator may . . . request review of the assignment."). Section 9706(f) does not, however, provide review for an improperly calculated premium; thus, the proper recourse for a miscalculation claim would be, as we explained in *Pittston*, through either a tax refund action or through additional overpayment remedies provided under the Coal Act or ERISA. *See Pittston*, 199 F.3d at 703-04.



Under the circumstances of this case, we find that the exercise of jurisdiction is appropriate.[4]

## III.

Having concluded that the district court had subject matter jurisdiction, we now turn to the merits. The Commissioner advances a two-fold argument. First, he contends that the district court misread the statute and that, in fact, a straight reading of the final paragraph of section 9701(c)(2)(A) shows that a successor in interest to a signatory operator qualifies as a related person, which would permit the assignment of the retirees and beneficiaries to Jericol. Second, the Commissioner argues that if the district court's reading of the statutory text is correct, it is a reading that produces inexplicable, anomalous results that are clearly at odds with congressional intent. In support of this second argument, the Commissioner urges us to follow *R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 894-96 (D.C. Cir. 1999), a split-panel decision of the District of Columbia Circuit Court of Appeals sanctioning just such an approach.[5]

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[4] Our conclusion is consistent with *Eastern Enterprises*, which affirmed the exercise of jurisdiction over an action for declaratory and injunctive relief, although the Court did not expressly consider the same jurisdictional issue we consider here. *See Eastern Enterprises*, 524 U.S. at 519- 22, 118 S. Ct. 2131.

[5] In order to resolve the issue presented to us, we need not address Jericol's argument to the extent it suggests that under the Coal Act, the terms "successor" and "successor in interest" are distinct, *see Leckie*, 99 F.3d at 585 n.15, and that Jericol does not qualify as a "successor in interest" to Shackleford. Like the district court, we leave these questions for another day, and we will

A.

We cannot agree with the Commissioner that a successor in interest to a signatory operator falls within the Coal Act's definition of "related person." Section 9701(c)(2)(A) establishes three categories of persons that qualify as "related persons" to signatory operators: (1) "member[s] of the controlled group of corporations . . . which includes such signatory operator[s]," 26 U.S.C.A. § 9701(c)(2)(A)(i); (2) "trade[s] or business[es]" that are "under common control" with the signatory operator, *see* 26 U.S.C.A. § 9701(c)(2)(A)(ii); and (3) certain persons having a partnership interest or engaged in a joint venture with a signatory operator, *see* 26 U.S.C.A. § 9701(c)(2)(A)(iii). The ultimate paragraph of section 9701(c)(2)(A) provides that "[a] related person shall also include a successor in interest of any person *described* in clause (i), (ii), or (iii)." 26 U.S.C.A. § 9701(c)(2)(A) (emphasis added).

Jericol does not qualify as a "related person" to Shackleford under clauses (i), (ii) or (iii) of section 9701(c)(2)(A), and the Commissioner does not suggest as much. Rather, he hangs his hat on the last paragraph, contending that "any person described in clause (i), (ii), or (iii)" includes signatory operators because the term "signatory operator" appears in each of the three clauses. Such a reading of the text, however, would require us to completely ignore the statutory context and read the phrase "signatory operator" in a vacuum. The final paragraph of section 9701(c)(2)(A) plainly says "successor in interest of any person described in clause

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simply assume, for analytical purposes, that Jericol is indeed a successor in interest to Shackleford, whatever the precise nuances of that term.



(i), (ii), or (iii)." Thus, to be a "related person" under the statute, Jericol must be a successor in interest to a person who is described by clause (i), (ii), or (iii). Shackleford, a signatory operator to whom Jericol succeeded in interest (according to the Commissioner's argument), is not *described* in any of these three predicate clauses. The text makes this self-evident by explaining that a person described in clause (i), (ii), or (iii) "shall be considered to be a related person *to a signatory operator*." 26 U.S.C.A. § 9701(c)(2)(A) (emphasis added). The statutory definition of "related person" obviously turns on the relationship a person or company has to a signatory operator. Each clause describes persons who are connected to a signatory operator in a way that justifies "related person" status. The inclusion of the term "signatory operator" in each clause just explains the connection. As the court observed in *R.G. Johnson*, to read this subsection as the Commissioner suggests would produce a nonsensical definition of "related person":

> Because the persons *described* in those clauses are described in terms of their relationship to the signatory operator, it would seem evident that they cannot include the signatory itself. To suggest otherwise is tantamount to saying "I am related to me." . . . [T]he Commissioner cannot overcome the fact that in order to be deemed a related person, a successor in interest must be one to a person described in those clauses.

*R.G. Johnson*, 172 F.3d at 894 (emphasis in original).

Like the Commissioner, the Trustees of the UMWA Combined Benefit Fund, as *Amici Curiae*, advance an argument that is based on a somewhat circular interpretation of the text: that "signatory operator" is necessarily described in clause (i) because, by definition, it is a member of a group "which includes such signatory operator." This is simply another version of the Commissioner's argument, and it suffers from the same contextual infirmity.

We are confident the Coal Act excludes a successor in interest to a signatory operator from the definition of "related person." The text makes this clear and unambiguous. Thus, we need not defer to the interpretation of the Social Security Administration. *See Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778.

**B.**

**1.**

If we apply the statute the way Congress has written it, the Commissioner fears that we will nevertheless do violence to what Congress probably intended and that our reading of the statute will lead to anomalous ends. If a literal reading of a statute produces an outcome that is "demonstrably at odds" with clearly expressed congressional intent to the contrary, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989), or results in an outcome that can truly be characterized as absurd, *i.e.*, that is "'so gross as to shock the general moral or common sense,'" *Maryland State Dep't of Educ. v. United States Dep't of Veterans Affairs*, 98 F.3d 165, 169 (4th Cir. 1996) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 59-60, 51 S. Ct. 49, 75 L.Ed. 156 (1930)), then we can look



beyond an unambiguous statute and consult legislative history to divine its meaning. But, such instances are, and should be, exceptionally rare. *See TVA v. Hill*, 437 U.S. 153, 187 n. 33, 98 S. Ct. 2279, 57 L.Ed.2d 117 (1978). The intent of Congress as a whole is more apparent from the words of the statute itself than from a patchwork record of statements inserted by individual legislators and proposals that may never have been adopted by a committee, much less an entire legislative body—a truth which gives rise to "the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12, 107 S. Ct. 1207, 94 L.Ed.2d 434 (1987). Therefore, when the terms of a statute are clear and unambiguous, our inquiry ends and we should stick to our duty of enforcing the terms of the statute as Congress has drafted it. *See Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L.Ed. 442 (1917) ("[T]he sole function of the courts is to enforce [the statute] according to its terms."). This principle applies, too, in the face of an agency's construction of the statute that it administers. *See Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). As a result, we are more than a little hesitant to abandon the presumption that Congress meant what it said, or did not say, when the words of a statute are plain, as they are here.

Pressing his argument that our reading of the statute contravenes congressional intent, the Commissioner points first to the congressional findings and declaration of policy prefacing the Coal Act. *See* Pub. L. No. 102-486, § 19142, 106 Stat. 3036, 3037 (1992). In light of

the troubled history that for decades dogged the system of multi-employer benefit plans for coal miners, Congress determined that "it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry *to identify persons most responsible for plan liabilities* in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3036, 3037 (1992) (emphasis added). According to the Commissioner, our reading of the definition of "related person" produces results that are at cross-purposes with the explicit congressional pronouncement that it intended "to identify persons most responsible for plan liabilities." Specifically, he questions the logic of imposing, as section 9701(c)(A)(2) clearly does, "related person" liability upon a successor in interest to a "related person" but not upon a successor in interest to the signatory operator itself. The Commissioner argues that there cannot be a more responsible person for Combined Fund liabilities than Jericol, a company that took over Shackleford's mining operation, used its name for a period of time, and agreed to assume Shackleford's responsibilities under its collective bargaining agreement with the UMWA. Apparently the only other circuit court of appeals to have considered this issue held, in a split panel decision, that such a result ran contrary to the general purpose of the Coal Act, reasoning that there was simply no good reason for such an odd result. *See R.G. Johnson*, 172 F.3d at 895.

We are not convinced, however, that the literal language of section 9701(c)(2)(A) is contrary to clearly expressed congressional intent. First, the general and somewhat vague statement of congressional findings in the preamble to the Coal Act does not impress us as the



kind of pellucid expression of legislative intent that would displace a specific textual provision that is clear and unambiguous. And, even if it were, we do not automatically agree with the Commissioner's apparent assumption that an asset purchaser like Jericol is obviously the "most responsible" person where these miners are concerned. After all, Jericol never actually employed any of the miners at issue; it is certainly not an absurd notion to think that a company which was under common financial control with Shackleford during the miners' employment (and therefore a "related person"), or a successor in interest to such a company, could be considered the "most responsible" person for Combined Fund purposes. As Jericol has suggested, the benefits conferred by the retired miners in this case ran to Shackleford and those in financial partnership with it. To the extent that the retired Shackleford miners conferred a benefit on Jericol, such as improving the physical assets of the operation or advancing the goodwill of the company through their hard work, Jericol presumably paid fair market value for these benefits under the terms of the asset purchase.

The Commissioner's position is not strengthened by the legislative history to which he and the *Amici* point us. First, they offer a statement made during the floor debate by one of the sponsors of the Coal Act which interpreted the definition of "signatory operator" under section 9701(c)(1) to include a successor in interest to the signatory operator. *See* 138 Cong. Rec. S17566-01, 17634 (daily ed. Oct. 8, 1992) (statement of Sen. Rockefeller). If we were presented with an ambiguous statute, such commentary might conceivably provide some interpretive guidance; however, even then such comments would be of limited use since they are directed at

the definition of "signatory operator" as opposed to "related person." But we have been asked to consider a statute that does not need interpretation. The statute simply does not encompass a successor in interest to a signatory operator. Moreover, a brief comment from the floor by a single legislator, albeit one of the Act's sponsors, is not conclusive evidence of what the entire legislative body believes. *See United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L.Ed.2d 358 (1982) ("Passing references and isolated phrases are not controlling when analyzing a legislative history.").

Second, the Commissioner offers portions of a document from the Congressional Record in an attempt to establish clear legislative intent to the contrary. Specifically, he points to a technical explanation of the Coal Act inserted into the Congressional Record by Senator Wallop which maintains that a "related person" includes "in specific instances successors to the collective bargaining agreement obligations of a signatory operator." 138 Cong. Rec. S17566-01, S17604 (daily ed. Oct. 8, 1992).[6] We refuse to displace a clear statutory provision which was passed by both houses of Congress and signed into law by the President with an explanation proffered by a single member of Congress. While worthy of consideration, it is simply not the sort of conclusive legislative history that would trump contrary language in the statute. *See Garcia v. United States*, 469 U.S. 70, 76-77, 105 S. Ct. 479, 83 L.Ed.2d 472

[6] The parties refer to this material as a proposed conference report. We agree that this material was never adopted by the Conference Committee, but prefer to describe the material as did the Senator who introduced it into the Congressional Record—as a technical explanation.



(1984) (preferring legislative history that reflects the collective understanding of a committee to the views of an individual legislator). We have found nothing in the Conference Report itself to suggest that other members of Congress signed on to this interpretation of the statute. *See* H.R. Conf. Rep. No. 102-1018 (1992). And, *R.G. Johnson* supports us on this score as well, observing that the relevant legislative history is inconclusive. *See R.G. Johnson*, 172 F.3d at 894.

We are satisfied that the legislative history on this point should not displace the language of the statute as a tool for determining congressional intent, especially when Congress included elsewhere in the statute language that the Commissioner wants us to read into the definition of "related person." For purposes of the UMWA 1992 Benefit Plan and the individual employer plans which the Coal Act kept in place, Congress specifically defined the term "last signatory operator" to include "a successor in interest of such operator." 26 U.S.C.A. § 9711(g)(1). Congress could easily have included this phrase in the final paragraph of section 9701(c)(2)(A). It did not do so, however, and we think this suggests that Congress acted intentionally when it omitted a successor in interest to a signatory operator from the definition of "related person." *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

Accordingly, we decline to defer to the legislative history in the face of clear statutory language.

2.

Finally, the Commissioner argues that we cannot follow the statute as it is written because the way Congress has drafted the "related person" definition begets, under the right set of circumstances, some fairly odd results. For instance, why would Congress allow a company that has literally taken over the coal mining production of a defunct signatory operator (assuming such a company is a successor in interest) to escape liability, but pin financial responsibility on a *successor in interest* to a company that was unrelated to the coal industry—say, a trucking company—merely because the trucking company and the signatory coal operator were under common financial control prior to the passage of the Coal Act? In light of the statutory purpose, says the Commissioner, it would have been wiser to make it the other way around.

We are not persuaded that there is no logic to shielding successors in interest to signatory operators from liability but not successors in interest to "related persons." Jericol submits, as did Judge Randolph in his dissent to *R.G. Johnson*, that such a provision (making successors in interest to "related persons" liable instead of successors in interest to signatory operators) promotes the sale of coal companies:

> Without the exemption, prospective purchasers can never be sure of their risks. Their liability would depend on whether, sometime in the future, the seller—that is, the signatory operator—ceases to "remain[ ] in business," a matter wholly outside their control.



*R.G. Johnson*, 172 F.3d at 896 (Randolph, J., dissenting). And, indeed, such an idea makes sense in view of the historical backdrop and legislative history, which suggest that perhaps Congress had good reason after all to pass section 9701(c)(2)(A) in its current version, the Commissioner's argument to the contrary notwithstanding. As observed in the Coal Commission's report to Congress, over half of the pre-Coal Act beneficiaries were "orphans" who were drawing benefits from a pot jointly funded by coal operators. *See* Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits, Coal Commission Report, Executive Summary VII (1990) (Coal Commission Report). A major complaint lodged by the coal operators was that they were being required to pay benefits for retired miners who never worked for them or maintained any other relationship with them. *See* 138 Cong. Rec. S17566-01, S17607 ("The coal companies that are still fully signatory to the bargaining agreement have complained that for every dollar they have been paying into the UMWA 1950 and 1974 Health Benefit Funds for their own retirees and dependents, they pay an additional three dollars on behalf of 'orphans' of other companies."). Imposing liability under the Combined Fund upon successors in interest to signatory operators would produce the same results because operators that did not receive the benefit of the retired miners' employment would nevertheless be responsible for them under the Combined Fund. In fact, such a requirement would arguably have put coal operators who purchased another operator's assets in a worse position since under the Act they are solely responsible for their assigned retirees. Jericol suggests that in an industry where buying and selling coal mining assets is commonplace, such a provision

would present a significant impediment to the coal companies' support for the Coal Act, which, in turn, would supply Congress with a motive for omitting the provision. Indeed, the scheme for assigning retirees to coal operators was a point of contention throughout the legislative process. *See* 138 Cong. Rec. S18250-02, S18250 (daily ed. Oct. 8, 1992) (statement of Sen. Glenn) ("[T]he coal industry retiree health benefits package before us today has been among the most contentious matters facing legislators this year.").

Clearly, the explanation Jericol offers is not indisputably evident from extra-textual sources; however, it is certainly plausible, and that is all we need to reject the assertion that the Coal Act's definition of "related person" is, on its face, absurd. And, we recognize that there is a counterpoint to the idea that Congress may have been trying to foster the sale or transfer of coal companies—that if this were truly a congressional aim, Congress would also have exempted a successor in interest to a "related person" when the "related person" is a company involved in the coal industry, rather than a trucking company or some other company that is not tethered to the coal industry. *See R.G. Johnson*, 172 F.3d at 895. But, even if this is true—if the literal text of the statute produces a result that is, arguably, somewhat anomalous—we are not simply free to ignore unambiguous language because we can imagine a preferable version. *See United States v. Sheek*, 990 F.2d 150, 153 (4th Cir. 1993) ("Even if the result appears to be anomalous or absurd in a particular case, the court may not disregard unambiguous language."). Perhaps it would be good policy to exempt successors in interest to "related persons" in the coal industry. As Judge Randolph observed, however, "Congress rarely has to



go as far as its logic would take it." *R.G. Johnson*, 172 F.3d at 896. For us to read into the statute language that is simply not there would require us to believe that the text as Congress drafted it produced an absurdity "'so gross as to shock the general moral or common sense.'" *Maryland State Dep't of Educ.*, 98 F.3d at 169 (quoting *Crooks*, 282 U.S. at 59-60, 51 S. Ct. 49). We see nothing in section 9701(c)(2)(A) to convince us that this is one of those rare instances in which we should stray from the words of the statute itself.

What we are being asked to do is improve the statute —to amend it, really. The Commissioner's reading of the statute may be appealing in terms of its logic, but we cannot adopt it as our own without trespassing on a function reserved for the legislative branch:

> [I]f Congress did not say what may appear more reasonable, and said something else, a court may not step in and perform a congressional, *i.e.*, legislative, act.
>
> . . . We must interpret statutes as written, not as we may wish for them to be written. Congress' role is to enact statutes; the judiciary's to interpret those statutes as written.

*United States v. Childress*, 104 F.3d 47, 53 (4th Cir. 1996).[7] Because our job is to determine the meaning of

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[7] We also decline the invitation of the *Amici* to use our interpretations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), *see* 42 U.S.C.A. § 9601 (West 1995 & Supp. 1998), as an interpretive guide to section 9701(c)(2)(A) of the Coal Act. *See United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992) (adopting successor liability under CERCLA). Since the meaning of the text

the statute passed by Congress, not whether wisdom or logic suggests that Congress could have done better, we conclude that section 9701(c)(2)(A) does not affix "related person" liability upon a successor in interest to a signatory operator.

IV.

For the foregoing reasons, the decision of the district court is affirmed.

*AFFIRMED.*

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here is self-explanatory, there is no need for us to make a dubious attempt at determining whether the apparent intent of one Congress in enacting a statute is at all useful for discovering the intent of another Congress in enacting a separate, unrelated statute.



MURNAGHAN, Circuit Judge, dissenting:

Because the majority's adherence to the literal language of the Coal Act's definition of "related persons" produces a result demonstrably at odds with the intentions of its drafters, I respectfully dissent.

I.

The crisis in the coal industry that preceded the passage of the Coal Act resulted from the financial instability of the 1950 and 1974 Benefit Plans. In the 1978 Coal Wage Agreement, individual signatory operators assumed responsibility for providing health benefits for their post-1975 retirees and active workers. The 1978 Agreement retained the 1974 Benefit Plan as an "orphan" plan to provide health benefits for post-1975 retirees whose last employer had gone out of business. The 1950 Benefit Plan was also retained to provide benefits for miners who had retired before 1976 and their dependents. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 510, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998).

The 1978 Agreement did not work because several signatories left the mining business, "dumping" their retirees on the 1950 and 1974 Benefit Plans. The signatories that remained had to shoulder the burden of paying for the growing number of orphaned retirees, while at the same time paying for the health care of their own retirees. The rising costs of providing for orphaned retirees caused more signatories to leave the coal mining business, exacerbating the crisis. The coal industry thus was caught in a vicious circle that threatened to deprive more than 100,000 retired coal miners and their dependents of their promised lifetime health benefits. *See id.* at 511, 118 S. Ct. 2131.

Congress responded to the crisis by enacting the Coal Act in 1992. Congress wanted to avoid the problems that plagued the coal industry in the 1980s—too many unallocated retirees supported by signatory operators that did not have any connection to the retirees. The Act therefore assigned liability for retiree health benefits to "related persons" to signatory operators as well as to the signatory operators themselves. *See* 26 U.S.C. § 9706(a). As a result, if a signatory operator went out of business, a "related person" would be on the hook for the signatory operator's retirees. Only when the Commissioner could not locate a "related person" still "in business" would the rest of the coal industry have to support an "orphaned" retiree. *See* 26 U.S.C. § 9704(a)(3), (d), § 9706(a).

The Coal Act defines related persons in § 9701(c)(2)(A), which provides:

> (2) Related persons.—
>
> (A) In general.—A person shall be considered to be a related person to a signatory operator if that person is—
>
> (i) A member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within



> the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> *A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).*

26 U.S.C. § 9701(c)(2)(A) (emphasis added). The issue in the instant case is whether the definition of "related persons" includes successors in interest to signatory operators.[1]

II.

I agree with the majority's conclusion that a literal reading of § 9701(c)(2)(A) unambiguously excludes successors in interest to signatory operators. I therefore would not defer to the Commissioner's strained interpretation of the definition. I would nevertheless construe § 9701(c)(2)(A) to include successors in interest to signatory operators because I agree with the D.C. Circuit that the instant case is one of those "rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 895 (D.C. Cir. 1999) (quoting *United*

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[1] For purposes of my analysis, and in response to the majority's reasoning, I assume Jericol qualifies as a successor in interest to Shackleford. I would not reach this issue on appeal, however, because the district court has not ruled on the issue. *See R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 895 (D.C. Cir. 1999) (refusing to consider whether a coal company qualified as a "successor in interest" to a signatory operator because the district court had not ruled on the issue).

*States v. Ron Pair Enters.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989)).

A literal interpretation of the definition of "related persons" causes a result that directly conflicts with Congress's stated purpose in enacting the Coal Act. Congress declared that its purpose in enacting the Act was "to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037 (codified at note following 26 U.S.C. § 9701). Outside of the signatory operators, no entities are "more responsible" for plan liabilities than successors in interest to signatory operators. Here, for example, Jericol took over Shackleford's mining operations, employed many of its workers, and assumed its duties under the collective bargaining agreement with the UMWA. In addition, the asset purchase agreement between Shackleford and Jericol[2] included a clause allowing Jericol to use Shackleford's well-known corporate name. Jericol thus benefitted from the goodwill created, at least in part, from the work of the retirees that Jericol now attempts to dump on the rest of the coal industry.

A literal interpretation of the definition of "related persons," however, would turn Congress's stated purpose on its head: entities with only a tenuous connection to the retired coal miners would be jointly and severally liable for Fund benefits while direct successors to the signatory operators who employed the miners are excluded from liability. For example, under a literal interpretation of § 9701(c)(2)(A), a thrice-removed successor in interest to a food distributor under common control with a signatory coal mine operator would be liable for the health benefits of a signatory's retired coal miners, while a company like Jericol, a coal mining direct successor in interest to a signatory operator, would be excluded from liability. Congress could not have intended such an anomalous result.

[2] Jericol was then known as Irdell Mining, Inc.



My conclusion is in accord with the only other circuit to consider this issue. In *R.G. Johnson*, the D.C. Circuit stated that

> [i]n light of [the purpose of the Act] and the broad reach of the provisions imposing liability on related persons, we can think of no reason why Congress would have intended to impose liability for the beneficiaries on, for example, a successor in interest to a Coca-Cola bottling company under common control with a signatory coal mine operator while exempting a coal-mining successor in interest to that operator.

*Id.* at 895. The court therefore held that it would construe § 9701(c)(2)(A) to include successors in interest to signatory operators. *See id.*

In the instant case, the majority recognizes that a literal interpretation of "related persons" causes a result "that is, arguably, somewhat anomalous." Maj. op. at [35a]. However, seizing on the theory advanced in Judge Randolph's dissent in *R.G. Johnson*, the majority attempts to explain the anomalies by speculating that Congress may have intended to exclude successors in interest to signatory operators from liability to promote the sale of coal companies.

I disagree with the majority's theory because it presumes that Congress intended to promote the exact practice that necessitated legislative action in the first place. The widespread dumping of retirees by signatory operators leaving the coal industry was the principal cause of the coal industry's crisis. The remaining signatory operators were forced to shoulder the burden of paying for more orphaned retirees, thereby encouraging more signatories to leave the industry. In light of this history, it is unimaginable that Congress could have intended to promote the sale of coal companies to successors who would not be liable for Fund benefits.

Furthermore, excluding successors in interest from liability for retiree benefits does more than *promote* the sale of coal companies; it *actively encourages* the sale of coal companies. Under the majority's interpretation of the Act, coal companies are worth more to successors than they are to signatory operators. For instance, Jericol can avoid $237,000 in yearly contributions to retirees if successors are not liable under the Act. Other coal companies undoubtedly have significantly higher contributions under the Act.[3] A successor who can avoid these costs will be willing to pay more for a coal company than the value of the company as an ongoing entity, because the successor could avoid a major liability of the company.

Profit-seeking signatory operators therefore will maximize shareholder value by selling their assets to a successor, distributing the proceeds to shareholders,

[3] For instance, a signatory operator who has been in the industry since the 1960s would be liable for the health benefits for thirty years of retirees. Under the majority's analysis, a successor to this company would be liable for none of these benefits.



and then dissolving. The remaining signatory operators will have to shoulder the burden of paying for the retirees of signatories who leave the business, further raising their costs of doing business; the additional costs will, in turn, encourage more signatories to sell their assets to successors. The ultimate result would be the same dwindling funding base that Congress intended to rectify by passing the Act. The majority's theory thus suggests that Congress intended to cure the crisis in the coal industry by infecting it with part of the disease.[4]

Finally, the majority offers no explanation for why Congress was concerned with promoting the sale of coal companies, but was not concerned with promoting the sale of companies related to a signatory operator. Instead, the majority baldly states that "Congress rarely has to go as far as its logic would take it." Maj. op. at [35a]. However, as is evident from my previous analysis, it was *clearly illogical* for Congress to exclude successors in interest to signatory operators from liability in the first place. Thus, to accept the majority's theory, one must believe that Congress was inconsistently illogical.

[4] Some might suggest that coal companies are unlikely to attempt to profit from such a "loophole" in the Coal Act; however, this suggestion ignores the fact that coal companies have a long history of using the tools of successorship to maximize shareholder profits at the expense of workers and retirees. *See generally* Grant Crandall et al., *Hiding Behind the Corporate Veil: Employer Abuse of the Corporate Form to Avoid or Deny Workers' Collectively Bargained and Statutory Rights*, 100 W. Va. L. Rev. 537 (1998).

## III.

The majority is rightfully cautious about judicially "rewriting" an unambiguous statute. Nevertheless, our duty is to give effect to the intent of Congress. Congress's intent is usually expressed in the plain meaning of a statute, but that is not always the case. The Supreme Court has stated that

> [l]ooking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."

*Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 455, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989) (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48, 49 S. Ct. 52, 73 L.Ed. 170 (1928)). Excluding successors in interest to signatory operators from liability for Fund benefits is plainly inconsistent with Congress's intent in enacting the Coal Act. I therefore would construe § 9701(c)(2)(A) as allowing the assignment of Fund beneficiaries to successors in interest to signatory operators. Accordingly, I dissent.



## APPENDIX B

### Coal Act Review Decision

Company Name: Jericol Mining, Incorporated

Company EIN: 61-0844927

Facts: Three PSCs assigned miners to Jericol Mining, Inc., EIN: 61-0844927. The operator's representative timely requested review of the assignment, alleging that the assignments were erroneous because Jericol Mining, Inc. is not the successor in interest of Shackleford Coal Co., Inc. The representative also requested an extension of 90 days in which to submit evidence to support the allegation.

The representative submitted additional evidence by letter dated June 9, 1994. The evidence consists of a copy of the contract wherein Irdell Mining, Inc. and Dale Company purchased the assets of Shackleford Coal Co., Inc. in 1973. The representative advises that Irdell Mining, Inc. for a period of time took the name Shackleford Coal Company, and later took the name Jericol Mining, Inc. The representative also stated that the partial purchase of assets by Irdell Mining and other terms of the contract establishes that Jericol Mining is *not* the successor in interest of Shackleford Coal.

The assignment of miners to Jericol Mining will depend on whether the purchase of Shackleford Coal was under conditions which will provide Jericol with the status of "successor" of Shackleford. Basically, when a business transfer is made to another owner who continues the

former owner's operation with little or no interruption or change, the new owner is a successor.

The elements that tend to support a finding that a business transfer was to a successor are: (1) employees of the former owner continue to work for the new owner with little or no interruption after the transfer; (2) the former owner transferred the business trade name to the new owner; (3) the former owner agrees not to compete with the new owner's business, or not to compete in the same geographical area; (4) the transfer includes sale of "good will," or the turning over of customer records, business records, contracts, leases, and the like; and (5) the prior owner agrees to work for the new owner as a consultant or employee. This list is not complete nor conclusive, and not all aspects must be present to establish that the transfer was to a successor.

The sales contract submitted by Jericol Mining's representative shows that Shackleford Coal sold its assets to Irdell Mining and Dale Company. The agreement was signed on behalf of Irdell Mining by James A. Sigmon, President, and on behalf of Dale by James A. Sigmon, General Partner. Since both purchasing companies are apparently owned by the same individuals, they can be considered to be the *same* company for assignment purposes under the Coal Act. The contract also requires Shackleford Coal to maintain the goodwill of its customers, provides that Irdell Mining will use the name of Shackleford, provides that Irdell Mining accept *all* outstanding contracts and agreements, and provides that non-compete agreements must be signed by all parties and submitted at the time of closing.



The records of the SSA (AEQY) shows that EIN 61-0844927 was issued in July 1973 to a company doing business as Shackleford Coal Company. The Form SS-4 shows that the reason for applying for the assignment of an EIN was: "Purchased going business." The AEQY also shows the company assigned this EIN later changed its name to Jericol Mining Incorporated.

The evidence clearly establishes that Jericol Mining, Inc. must be considered the successor in interest of Shackleford Coal Co., Inc. The sales agreement contains many of the criteria used to establish that the transfer of the business was to a successor, and the records of the SSA establish that the company now doing business as Jericol Mining, Inc. formally acknowledged the purchase of Shackleford Coal Co. and conducted business under the same name in 1973.

Decision: Jericol Mining, Inc., EIN 61-0844927, is the successor in interest of Shackleford Coal Company, Inc., as defined in the Coal Act. Accordingly, Jericol Mining is the appropriate assignment company for miners whose assignment is based on employment by Shackleford Coal.

/s/ JAMES M. SMALL
JAMES M. SMALL
Southeastern Program
Service Center
8/23/94

**Social Security Administration**
**Important Information**

Southeastern Program Service
Center
P.O. Box 10728
Birmingham, AL 35202
August 30, 1994

EIN: 61-0844927

JERICOL MINING, INC
C/O MCBRAYER, MCGINNIS, LESLIE
& KIRKLAND
ATTORNEYS AT LAW
P O BOX 1100
FRANKFORT, KY 40602-1100

We are writing to you about the miners assigned to you under the Coal Industry Retiree Health Benefit Act of 1992. Under this law, we assigned you responsibility for the payment of health and death benefit premiums for certain retired miners and their relatives who qualify. As you requested, we have reviewed the assignments.

What You Told Us

You told us that you are not the successor in interest to Shackleford Coal Company.

What We Have Decided

We had someone who did not make the assignments perform the review. Based on that review, we have determined that you are the successor in interest of Shackleford Coal Co. as defined in the Coal Act. The



sales contract you submitted shows that Irdell Mining purchased the assets of Shackleford Coal, that Shackleford Coal was required to maintain the goodwill of its customers, allowed Irdell to use the name of Shackleford after the purchase, transferred responsibility for *all* outstanding contracts and agreements, and required that non-compete agreements be signed and submitted at the time of closing. You have also advised us that Irdell did conduct business under the Shackleford name and subsequently changed the company's name to Jericol Mining. Therefore, you are still responsible for the health and death benefit premiums of the beneficiaries named on the enclosed list.

Enclosure(s):
Explanation of Review Decision

This decision does not pertain to other beneficiaries listed in any other notice of assignment that you may have received from another SSA office.

This decision is final. Under the Coal Industry Retiree Health Benefit Act of 1992 and our regulations, we cannot offer any hearing or other appeal of the decision, nor can we review this decision again unless, within 12 months of the notice of assignment, we decide the assignment reflects an error on the face of our records or was based on fraud.

If You Have Any Questions

If you have any questions about the decision explained in this letter, please call us at (205) 801-2600. If you do call, please have this letter with you. It will help us answer your questions. You can also write to us at the address shown at the top of this letter.

If you have any other questions, you should contact the UMWA Combined Benefit Fund at the address below:

UMWA Combined Benefit Fund
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 895-3700

/s/ CAROLYN W. NEYMAN
CAROLYN W. NEYMAN
Assistant Regional
Commissioner
Processing Center Operations



## Explanation of Review Decision

Below we identify the miners and any eligible relatives whom we previously assigned to you. We also show the reason we have decided that you are still responsible for the coal industry health and death benefit premiums for the individuals.

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A review of the earnings records shows that the miners listed below worked for you for the periods shown. In addition, the UMWA Combined Benefit Fund records show that you were a signatory to an UMWA agreement for the period shown below. Based on this, we determined that you were a signatory to an UMWA agreement, and the signatory operator, still in business, to employ the miner in the coal industry under an agreement for the longest period of time before 1978. After working for you, the miner did not work for any other coal industry employer.

(* denotes miner)

| Beneficiary | SSN | Date(s) Miner Employed by Operator | Signatory Dates |
|---|---|---|---|
| *Wheeler E Fleenor | [REDACTED] | 09/64-12/68<br>06/69 | 10/10/63-<br>12/06/77 |
| Magdalene Fleenor | [REDACTED] | | |
| *Clarence Kelly<br>Juanita Kelly | [REDACTED] | 12/65-06/73 | 10/10/63-<br>12/06/77 |
| *G L Long<br>Georgia Long<br>Shawn D Long<br>Brannon D Long | [REDACTED] | 06/64-06/73 | 10/10/63-<br>12/06/77 |
| *Lester Thomas<br>Sarah Thomas | [REDACTED] | 12/63-06/66 | 10/10/63-<br>12/06/77 |

**Social Security Administration**
**Important Information**

Northeastern Program
Service Center
P.O. Box 6300
Jamaica, N.Y. 11431

Date: September 8, 1994

EIN: 61-0844927

McBrayer, McGinnis, Leslie & Kirkland
Attn: Christopher M. Hill
P.O. Box 1100
Frankfort, KY 40602-1100

We are writing to you about the miners assigned to Jericol Mining, Inc. under the Coal Industry Retiree Health Benefit Act of 1992. Under this law, we assigned Jericol Mining, Inc. responsibility for the payment of health and death benefit premiums for certain retired miners and any relatives who qualify. As you requested, we have reviewed the assignment(s).

## What You Told Us

You told us that Jericol Mining, Inc. should not be assigned miners that worked for the Shackleford Coal Company because the two companies are not related.

## What We Have Decided

We had someone who did not make the assignments perform the review. Based on that review, we have determined Jericol Mining, Inc. is still responsible for the health and death benefit premiums of some, but not all, of the beneficiaries named in the letter we sent to



you on 09/28/93. While Jericol Mining, Inc. did not purchase the entire assets of the Shackleford Coal Company, they adopted use of the Shackleford name and continued operations under Shackleford's United Mine Workers Of America (UMWA) agreement. Therefore Jericol Mining, Inc. is the successor to Shackleford Coal Company. Enclosed is a list of the beneficiary(ies) for whom Jericol Mining, Inc. is still responsible, and a list of the beneficiary(ies) for whom they are not responsible.

This decision does not pertain to any beneficiary(ies) listed in other letter(s) of assignment received from another SSA office.

We will notify the United Mine Workers of America Combined Benefit Fund about this change.

This decision is final. Under the Coal Industry Retiree Health Benefit Act of 1992 and our regulations, we cannot offer any hearing or other appeal of the decision, nor can we review this decision again unless, within 12 months of the notice of assignment, we decide the assignment reflects an error on the face of our records or was based on fraud.

Enclosure(s):
Explanation of Review Decision

## If You Have Any Questions

If you have any questions about the decision explained in this letter, please call us at 718-557-5505. If you do call please have this letter with you. It will help us answer your questions. You can also write to us at the address shown at the top of this letter.

If you have any other questions, you should contact the United Mine Workers of America (UMWA) Combined Benefit Fund at the address below:

UMWA Combined Benefit Fund
4455 Connecticut Ave. N. W.
Washington, D.C. 20008
(302) 895-3700

Anne Jacobosky
Assistant Regional Commissioner
Processing Center Operations

cc:
UMWA Combined Benefit Fund



**Explanation of Review Decision**

Below we identify the miner(s) and any eligible relatives that we previously assigned to Jericol Mining, Inc. We also show the reason we have decided that Jericol Mining, Inc. is still responsible for the coal industry health and death benefit premiums for the individual(s).

A review of the earnings record(s) shows that the miner(s) listed below worked for Shackleford Coal Company. The UMWA Combined Benefit Fund records show that Shackleford Coal Company is related to Jericol Mining, Inc., and that Shackleford Coal Company was a signatory to an UMWA agreement for the period(s) shown below.

Under the rules for how we assign premium responsibility, Shackleford Coal Company would have been the responsible operator because it employed the miner in the coal industry under an UMWA agreement, and employed the miner under an UMWA agreement for the longest period of time before 1978. However, as a related company, Jericol Mining, Inc. is responsible for the miner(s) and any eligible relatives named below.

Asterisk (*) denotes miner.

| Miner | SSN | Date(s) Miner Employed by Signatory Operator | Signatory Date(s) |
|---|---|---|---|
| *Mink, William R.<br>Mink, Lorene | [REDACTED] | 12/63-06/73 | 10/10/63-12/06/77 |
| *Thornbury, Sherman K. | [REDACTED] | 3/66-9/70, 6/71 | |
| *McCrary, Gillis<br>McCrary, Ruby | [REDACTED] | 12/63-06/73 | |



## Coal Act Review Decision

| | |
|---|---|
| Company Name: | Jericol Mining, Inc. |
| Address: | RT 1, Box 1000<br>Cumberland Gap, TN 37724-9801 |
| EIN: | 61-0844927 |

Nature of Protest:

The miner, Gillis McCrary ([REDACTED]), was assigned to Jericol Mining, Inc. based upon work for Jericol Mining, Inc. and its related company, Shackleford Coal Co., Inc. from 12/63 through 12/77 covered under an agreement. Jericol protested the assignment asserting that it was not related to Shackleford.

Evidence Reviewed:

Letter from company, Hot List, Pre-'78 List, ERQY, Miners' E/R, UMWA Records.

Rationale:

While Jericol admits purchasing part of Shackleford's assets in 1973, the company maintains it was not a successor in interest. However Jericol adopted use of the Shackleford name, continued to operate under Shackleford's UMWA agreement and otherwise acted as its successor. Therefore Jericol is Shackleford's successor. Work for related companies is combined in calculating liability assignment. Shackleford/Jericol was the last coal company to employ the miner and did so for a total of 141 months, by far the longest employment by a coal company. Therefore

the decision to assign the miner under category three was correct.

Determination:

The decision to assign Gillis McCrary ([REDACTED]) to Jericol Mining Inc. is affirmed.

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Signature: [Illegible] Title: CRTA Date: 9/9/94

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## Coal Act Review Decision

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| | |
|---|---|
| Company Name: | Jericol Mining, Inc. |
| Address: | RT 1, Box 1000<br>Cumberland Gap, TN 37724-9801 |
| EIN: | 61-0844927 |

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Nature of Protest:

The miner, Sherman K. Thornbury ([REDACTED]), was assigned to Jericol Mining, Inc. based upon work for its related company, Shackleford Coal Co., Inc. from 03/66 through 09/70 and 06/71 covered under an agreement. Jericol protested the assignment asserting that it was not related to Shackleford.

Evidence Reviewed:

Letter from company, Hot List, Pre-'78 List, ERQY, Miners' E/R, UMWA Records.

Rationale:

While Jericol admits purchasing part of Shackleford's assets in 1973, the company maintains it was not a successor in interest. However Jericol adopted use of the Shackleford name, continued to operate under Shackleford's UMWA agreement and otherwise acted as its successor. Therefore Jericol is Shackleford's successor. Shackleford was the last coal company to employ the miner. Since Shackleford is a pre-78 signatory and employed the miner for more than 24 months the assignment must be made under category three. Shackleford employed the miner longer than any other coal company that is still active

or has an active related company. Therefore the original assessment was correct.

Determination:

The decision to assign Sherman K. Thornbury ([REDACTED]) to Jericol Mining Inc. is affirmed.

---

Signature: [Illegible] Title: CRTA Date: 9/9/94

---



## Coal Act Review Decision

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Company Name: Jericol Mining, Inc.
Address: RT 1, Box 1000
Cumberland Gap, TN 37724-9801
EIN: 61-0844927

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Nature of Protest:

The miner, William Mink ([REDACTED]) was assigned to Jericol Mining, Inc. based upon work for its related company, Shackleford Coal Co., Inc. from 12/63 through 12/73 covered under an agreement. Jericol protested the assignment asserting that it was not related to Shackleford.

Evidence Reviewed:

Letter from company, Hot List, Pre-'78 List, ERQY, Miners' E/R, UMWA Records,

Rationale:

While Jericol admits purchasing part of Shackleford's assets in 1973, the company maintains it was not a successor in interest. However Jericol adopted use of the Shackleford name, continued to operate under Shackleford's UMWA agreement and otherwise acted as its successor. Therefore Jericol is Shackleford's successor. Shackleford was the last coal operator, except for Jericol itself, to employ the miner. Since neither company is a 1978 signatory, the assignment must be made under category three. Shackleford employed the miner for 88 months,

longer than any other coal company. Therefore the original assessment was correct.

Determination:

The decision to assign William Mink ([REDACTED]) to Jericol Mining Inc. is affirmed.

---

Signature: [Illegible] Title: CRTA Date: 9/9/94

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**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

---

CIVIL ACTION No. 96-0148-B

SIGMON COAL COMPANY, INC. AND
JERICOL MINING, INC., PLAINTIFFS

*v.*

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, ADMINISTRATION, DEFENDANT

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[Filed: Nov. 18, 1998]

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**ORDER**

BY: GLEN M. WILLIAMS
SENIOR U.S. DISTRICT JUDGE

For the reasons stated in the memorandum opinion entered this day, it is hereby ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED and Defendants' Motion for Summary Judgment is DENIED. It is further ORDERED that Defendant withdraw the assignments challenged by Plaintiff Jericol in this case, and notify the Trustees of the United Mine Workers of America Combined Benefit Fund that such assignments have been withdrawn. Furthermore, Defendant shall be enjoined from assigning additional retirees of Shackleford Coal Company, Inc. (referred to

as "Shackleford One" in the court's opinion) to Plaintiff Jericol on the basis that Plaintiff is a related person to Shackleford Coal Company, Inc. This case shall be stricken from the docket of this court.

ENTER: This 18 day of November, 1998.

/s/ GLEN M. WILLIAMS
GLEN M. WILLIAMS
SENIOR UNITED STATES
DISTRICT JUDGE



**APPENDIX D**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

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Civil Action No. 96-0148-B

SIGMON COAL COMPANY, INC. AND
JERICOL MINING, INC., PLAINTIFFS,

*v.*

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT

---

[Filed: Nov. 18, 1998]

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**MEMORANDUM OPINION**

GLEN M. WILLIAMS, Senior District Judge.

**I. Introduction**

Plaintiffs filed this action June 25, 1996, alleging that Defendant Kenneth S. Apfel, Commissioner of Social Security (hereinafter, "Commissioner"),[1] in the course

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[1] Shirley S. Chater, then-Commissioner of Social Security, was named as Defendant when this case was filed. John J. Callahan was substituted as Defendant upon his appointment as Acting Commissioner of Social Security on March 1, 1997, pursuant to 42 U.S.C. § 405(g). Kenneth S. Apfel, current Commissioner of Social Security, was sworn into office on September 29, 1997, and

of assigning beneficiaries in the United Mine Workers of America Combined Benefit Fund (hereinafter, "Benefit Fund") to responsible operators under the Coal Industry Retiree Health Benefit Act of 1992 (hereinafter, "Coal Act"),[2] wrongfully assigned beneficiaries to Plaintiff Jericol Mining, Inc. (hereinafter, "Jericol").[3] Discovery was had and Plaintiffs moved for summary judgment. Defendant opposed Plaintiffs' Motion for Summary Judgment and submitted its own Motion for Summary Judgment. The Trustees of the Benefit Fund filed a brief as *amicus curiae*, also opposing the Plaintiff's Motion for Summary Judgment.

Action on the case was stayed pending the United States Supreme Court's decision in *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998). Thereafter, Plaintiffs filed a supplemental complaint alleging that the statute used to assign beneficiaries to responsible operators[4] was unconstitutional as applied to them. An October 22, 1998 telephone conversation between the parties, *amicus curiae* and the court confirmed that no additional filings would be made as to the matter of statutory interpretation and that the Motions were ripe for decision as to the statutory interpretation issue. The court exercises jurisdiction in this case under 28 U.S.C. § 1331, because

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thereafter was substituted as Defendant in this action, also pursuant to 42 U.S.C. § 405(g).

[2] 26 U.S.C. § 9701, *et seq.*

[3] Sigmon Coal Company, Inc. joins Jericol as a plaintiff in this action apparently because they are related persons under the Coal Act, *see* 26 U.S.C. § 9701(c)(2), and thus jointly and severally responsible for any amounts due from either of them. 26 U.S.C. § 9704(a).

[4] 26 U.S.C. § 9706(a).



the case arises under a federal statute. Venue is proper under 28 U.S.C. § 1391(e). Thus, the court will now decide both parties' Motions for summary judgment.

## II. Background of the Coal Act

The Coal Act was intended to stabilize health benefits for United Mine Workers Association (hereinafter, "UMWA") retirees.[5] The Act contains a statutory scheme for determining which "signatory operator" from the coal business[6] must pay annual premiums for each beneficiary in the Benefit Fund. The assignment statute, found at 26 U.S.C. § 9706(a), also provides that a "related person" to a signatory operator may be held accountable for premiums in cases where the signatory operator is no longer in business,[7] but the related person continues in business. The Commissioner of Social Security was directed to administer this statutory scheme.[8]

Application of the statutory scheme in 26 U.S.C. § 9706(a) proceeds through three levels of priority, as found in the statute below:

> For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related

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[5] 524 U.S. at 514, 118 S. Ct. at 2141-42.

[6] 26 U.S.C. § 9701(c)(1).

[7] "Business" is defined broadly in the Coal Act to include "conduct[ing] or deriv[ing] revenue from any business activity, whether or not in the coal industry." 26 U.S.C. § 9701(c)(7).

[8] Originally, the Secretary of Health and Human Services bore responsibility for administering the statute (Plaintiff's Memo. at 3).

person with respect to which) remains in business in the following order: (1) First, to the signatory operator which—(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years. (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry. (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

After this process is completed, a beneficiary may remain unassigned.[9] In such a case, transfer payments from the Abandoned Mine Reclamation Fund (hereinafter, "AML Fund") will be made to the Benefit Fund to pay the premiums of such beneficiaries.[10] If AML Fund transfer payments are insufficient to pay those premiums, assigned operators will pay the difference on a pro rata basis.[11]

**III. Facts**

Plaintiff Jericol was originally formed in 1973 as Irdell Mining, Inc. (hereinafter, "Irdell"), by James and

[9] *See* 26 U.S.C. § 9704(d).

[10] 26 U.S.C. § 9705(b).

[11] 26 U.S.C. § 9704(a)(3) and (d).



Charles Sigmon and Fred Langley (James Sigmon Affidavit at 1). Shortly after the formation of Irdell, it and The Dale Company purchased most of the operating assets, coal inventory, supplies, leases and contracts of Shackleford Coal Company, Inc. (hereinafter, "Shackleford One"). The contract for sale references several Exhibits listing the precise asssets, leases, contracts and commitments transferred. These Exhibits have not been made part of the record. Although there was common ownership between Dale and Irdell, no owner of either Dale or Irdell was an owner of Shackleford One. Irdell changed its name, operating as Shackleford Coal Company (hereinafter, "Shackleford Two") until 1977, when it again changed its name to Jericol (James Sigmon Affidavit at 2). While Shackleford One was a signatory to a coal wage agreement while it was in business, Shackleford Two was only signatory to the 1974 wage agreement.

In late 1993, Defendant notified Plaintiff Jericol that Plaintiff had been assigned responsibility for the premiums of 10 UMWA retirees and 10 of their dependents. Ten miners or dependents were assigned on the basis that Jericol was a related person to Shackleford One, a signatory operator. This assignment was based on 26 U.S.C. § 9706(a)(3).[12] Jericol challenged this decision, which was affirmed as the Commissioner found that Jericol was the "successor in interest" of Shackleford One. Shackleford One was the entity those miners had actually worked for and would have been the assigned signatory operator had it continued in business. In

[12] This information is gleaned from the letters and attachments sent from the Social Security Administration to Jericol as part of the administrative process.

1995, 49 additional retirees and 60 of their dependents were assigned to Jericol. Of these miners, 44 were assigned on the basis of their employment with Shackleford One. Jericol challenged the assignments which were based upon the Commissioner's position that Jericol was a successor in interest to Shackleford One, and thus a related person responsible for premium payments.

The following year, after this action was filed, 38 additional miners, plus dependents, were assigned to Jericol, 34 of them based upon employment with Shackleford One. Again, Jericol appealed the Commissioner's decision as it pertained to miners for whom liability for premiums was based upon the Defendant's classification of Jericol as a related person to Shackleford One. No final determination was issued by the Commissioner as to the 1995 and 1996 challenges by Jericol. In 1997, eight additional miners and dependents were assigned to Jericol, with three miners being assigned on the basis of their prior work for Shackleford One. Jericol planned to appeal those assignments, but contended that it should not be required to exhaust its administrative remedies before seeking relief from this court because of the similarity of the law and facts underlying each assignment of Shackleford One's miners to Jericol. After consideration, this court agrees.[13]

[13] *See Sager Coal Co.* v. *Apfel*, No. 96-1107, slip op. at 11-12 n.5 (W.D. Penn. Jan. 12, 1998) (noting the futility of further administrative challenges where, as here, the Commissioner is making repeated Coal Act assignments based upon similar facts and law).



In all, more than 100 retired miners plus their numerous dependents were assigned to Jericol as part of Defendant's assignment process. Of these assignments, more than 80 miners were assigned because Jericol was viewed as a successor in interest to Shackleford One. Dependents of the 80 miners thus assigned were also assigned to Jericol on the same basis. It should be clarified that Jericol does not herein appeal all assignments to it. Rather, this case only involves challenges to assignments made on the basis that it is responsible for premium payments on behalf of Shackleford One's miners.

## IV. Legal Discussion

### (A) Summary Judgment Standard

A party moving for summary judgment will have its motion granted if there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. In considering a grant of summary judgment, the court may consider the pleadings, depositions, answers to interrogatories, and admissions on file, as well as any affidavits filed with the court. Fed. R. Civ. P. 56(c). The court must view the evidence under consideration in the light most favorable to the non-moving party.[14]

### (B) Standard of Review of Agency Action

A finding of an agency, such as the one represented by Defendant, may be set aside by this court only if the

[14] *Cuddy* v. *Wal-Mart Super Ctr., Inc.*, 993 F. Supp. 962, 965 (W.D. Va. 1998) (citing *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)).

finding is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), is the landmark case on review of agency decisions. It established a two-prong test for determining the proper amount of deference to be given.

Under the *Chevron* test, the court must first decide "whether Congress has directly spoken to the precise question at issue."[15] If the statute is plain on its face, the court must give effect to the expressed intent of Congress, without consideration of the agency's decision.[16] In addition to "the particular statutory language at issue," the court must consider "the language and design of the statute as a whole."[17] However, if Congress has left a gap in the statute to be filled by the agency, the court must then determine whether the agency's decision is "based on a permissible construction of the statute."[18] If it is so based, then considerable deference must be given to the agency's interpretation of the regulations it promulgates to fill that gap.[19]

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[15] *Chevron*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L.Ed.2d 694.

[16] *Elliott* v. *Adm'r, Animal and Plant Health Inspection Serv.*, 990 F.2d 140, 144 (4th Cir. 1993).

[17] *Soc. Sec. Adm'n* v. *Fed. Labor Relations Auth.*, 956 F.2d 1280, 1283-84 (4th Cir. 1992) (citing *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L.Ed.2d 313 (1988)).

[18] *Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

[19] 467 U.S. at 843-44, 104 S. Ct. 2778.



**(C) Legal Analysis**

The matter of whether Congress has spoken clearly in enacting the Coal Act has been addressed by two other district courts earlier this year, with both finding the language of the Act to be plain.[20] At least one circuit court has also held that the language of the Act is plain.[21] In particular, one of the district courts has so held with respect to 26 U.S.C. § 9701(c)(2)(A).[22] This section is the statutory law governing the issue at hand, namely whether a successor to a defunct signatory operator can be held accountable as a "related person" to that signatory operator.[23] This court agrees with the rationale and findings of the above-cited courts, and concludes that Congress has plainly and clearly expressed itself in the statutory language at issue. Therefore, for the reasons stated below, the court must give effect to the expressed Congressional intent, as set

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[20] *See R.G. Johnson*, 994 F. Supp. 10, 14 (holding that 26 U.S.C. § 9701(c)(2)(A) has a plain meaning) and *Sager Coal Co.* v. *Apfel*, No. 96-1107, slip op. at 19 (W.D. Penn. Jan. 12, 1998) ("Section 9706(a) of the Coal Act is unambiguous").

[21] *Eastern Enters.* v. *Chater*, 110 F.3d 150, 155 (1st Cir. 1997) ("[T]he first step of the Chevron pavane is fully dispositive. Section 9706(a) of the Coal Act unambiguously delineates a classification regime."), *rev'd sub nom. on other grounds, Eastern Enters.* v. *Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998).

[22] *R.G. Johnson*, 994 F. Supp. 10.

[23] This issue is distinct from that addressed by 26 U.S.C. § 9706(b)(2), which provides for liability to be transferred to a successor where liability has already been assigned to a signatory operator, when such succession occurs after the enactment date of the Coal Act. *See R.G. Johnson Co., Inc.* v. *Apfel*, 994 F. Supp. 10, 14 (D.D.C. 1998).

out in the statutory language, rather than deferring to the Commissioner's decision.

The classification regime of 26 U.S.C. § 9706(a) does not provide, directly or indirectly via the definition of related persons at 26 U.S.C. § 9701(c)(2), for liability to be laid at the door of successors of defunct signatory operators. Defendant and *amicus curiae* contend otherwise, with the former arguing both that the language is broad enough and contains gaps for its regulations to fill (Defendant's Memo. at 15), and that "the record shows that Jericol meets the statutory criteria for a successor company" (*Id.* at 13). However, there is no such entity as a "successor company" anywhere in the Coal Act. *Amicus curiae* states that a " 'successor in interest' is a related person" (Amicus Memo. at 11), neglecting the last line and a half of the final sentence of 26 U.S.C. § 9701(c)(2). The language urged by Defendant and *amicus curiae* simply was not included by Congress when it enacted this statute. The court is also aided by the rule of statutory construction that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' This principle obtains here . . . [as] at two other points the Coal Act makes explicit reference to successors."[24]

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[24] 110 F.3d 150, 155 (citing *Brown v. Gardner*, 513 U.S. 115, 120, 115 S. Ct. 552, 130 L.Ed.2d 462 (1994)), *rev'd on other grounds*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451.



Defendant has imposed liability on the basis of Plaintiff Jericol's supposed status as a related person. "Related persons" are defined in 26 U.S.C. § 9701(c)(2). There are four types of related persons under that statute, the first three set out in individual clauses and the last one encompassing "a successor in interest of any person described in clause (i), (ii), or (iii) of 26 U.S.C. § 9701(c)(2)(A)." The text of 26 U.S.C. § 9701(c)(2)(A) reads:

> A person shall be considered to be a related person to a signatory operator if that person is—(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator; (ii) a trade or business which is under common control (as under section 52(b)) with such signatory operator; or (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest [is] as a limited partner. A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

The court finds that Congress has drafted this section in language which is very plain and clear. If an entity meets the criteria for any of these clauses, liability may attach. Additionally, a successor to persons described in the clauses may be liable.

As in *R.G. Johnson*, Defendant here does not claim that Jericol meets any of the requirements of clauses (i), (ii), or (iii). Neither does it contend that Shackleford One met any of those requirements (Defendant's Memo.

at 15), other than the contention that a signatory operator is described in those clauses.[25] Defendant does contend that the language of the final sentence of 26 U.S.C. § 9701(c)(2) is broad enough to allow use of its successor policy regulations which treat Jericol as a related person. The court disagrees, because the plain, straight-forward statutory language contains no gap left open for filling by the Defendant's regulations and policies. It clearly states that "a related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii)."

A "successor in interest" is undefined by the Coal Act. Despite the comprehensive briefs and arguments of the parties and *amicus curiae* on this issue, it is not necessary for the court to determine what the term means. Assuming, without deciding, that the Commissioner has the authority to interpret the term and has reasonably done so to classify Jericol as a successor in interest (Defendant's Memo. at 5), Jericol plainly did not succeed to the interest of "any person described in clause (i), (ii), or (iii)" of 26 U.S.C. § 9701(c)(2)(A).

The court finds that a signatory operator is not described by any of those three clauses. The words "signatory operator" are used in the clauses, but so are the words "limited partner." A full reading of the statute makes it clear that limited partners are in fact not to be considered related persons. There is definitely a distinction between "describing" a person and

[25] Defendant's Memo. at 21 (stating that ". . . the express language of the statute 'reaches forward' to impose joint and several liability on 'related persons' of responsible operators, *specifically including* the operators' successors. . . ." [emphasis in original] ) and Amicus Memo. at 16.



merely mentioning or naming them, and signatory operators are merely named and mentioned in the clauses. In fact, Congress demonstrated this distinction when it described signatory operators by defining them in 26 U.S.C. § 9701(c)(1).

Only through the use of its regulations is Defendant able to justify the assignments challenged by Plaintiffs. Defendant's position thus "depends upon the addition of words to a statutory provision which is complete as it stands,"[26] as several other courts have noted.[27] "Adoption of [the Defendant's view] would require amendment rather than construction of the statute, and it must be rejected here,"[28] where the plain language of the statute clearly reflects Congressional intent. There is simply no room for Defendant's successor policy regulations in this statute, because Congress has left no gaps to be filled by Defendant. Defendant's sole responsibility under this statute is to administer a very plain and simple assignment scheme, not to make regulations which correct perceived inequities.

As the court has concluded above that Congress had a clearly expressed intent in enacting the Coal Act, this court is duty-bound to give effect to that intent. Although Defendant and *amicus curiae* may feel that

[26] 481 U.S. 454, 463, 107 S. Ct. 1855, 95 L.Ed.2d 404.

[27] *Eastern Enters.*, 110 F.3d 150, 155, *rev'd on other grounds*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451 (noting the "unambiguously delineate[d] . . . classification regime" of the Coal Act's assignment provisions); *R.G. Johnson*, 994 F. Supp. 10, 15-16; *Sager Coal*, No. 96-1107, slip op. at 21.

[28] 481 U.S. 454, 463, 107 S. Ct. 1855, 95 L.Ed.2d 404.

the policy underlying the Coal Act is unsound,[29] the law is as Congress has written it and it is not the duty of this court to change the words of Congress.

**V. Conclusion**

For the foregoing reasons, the court concludes that the statutory language clearly reflects Congressional intent in enacting the Coal Act and thus the application of any gap-filling rules by Defendant is foreclosed. Thus, Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED.

The Clerk is directed to send certified copies of this Memorandum Opinion to all counsel of record.

ENTER: this 18 day of November, 1998.

/s/ GLEN M. WILLIAMS
GLEN M. WILLIAMS
SENIOR UNITED STATES
DISTRICT JUDGE

[29] Amicus Memo. at 15-16 (alleging a "completely absurd result" is reached under the position advocated by Plaintiffs and accepted by this court, and terming the statutory requirement of a controlled group of corporations in § 9701(c)(2)(A)(i) a "wholly irrelevant factor") and Defendant's Memo. at 28 (claiming that a "literal application of the language of the Coal Act" will produce an absurd result and "could result in unreasonable situations").



**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Case No. 96CV148-B

SIGMON COAL COMPANY, INC.;
JERICOL MINING, INC., PLAINTIFFS

*v.*

KENNETH S. APFEL, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION, DEFENDANT

[Filed: Dec. 18, 1998]

**ORDER**

Upon consideration of Memorandum of Defendant's Motion for Reconsideration, Plaintiffs' opposition thereto, and the entire record in this matter, it is hereby:

**ORDERED** that Defendant's Motion be **DENIED**. It is further **ORDERED** that Defendant withdraw the assignments challenged by Plaintiff Jericol in this case, and notify the Trustees of the United Mine Workers of America Combined Benefit Fund *and* Plaintiff Jericol within ten (10) days of the entry of this Order that such assignments have been withdrawn. Furthermore, Defendant shall be enjoined from assigning additional

retirees of Shackleford Coal Company, Inc. (referred to as ("Shackelford One") in the court's opinion) to Plaintiff Jericol on the basis that Plaintiff is a related person to Shackleford Coal Company, Inc. This case shall be stricken from the docket.

ENTERED this 18 day of December, 1998.

/s/ GLEN M. WILLIAMS
SENIOR UNITED STATES
DISTRICT JUDGE



**APPENDIX F**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 99-1219
CA-96-148-2

SIGMON COAL COMPANY, INCORPORATED;
JERICOL MINING, INCORPORATED,
PLAINTIFFS—APPELLEES

*v.*

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT—APPELLANT

---

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA COMBINED BENEFIT FUND,
AMICUS CURIAE

---

[Filed: November 15, 2000]

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**On Petition for Rehearing and Rehearing En Banc**

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Appellant filed a petition for rehearing and rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in

favor of rehearing en banc. Judges Motz and King voted to rehear the case en banc, and Chief Judge Wilkinson, and Judges Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler voted against rehearing en banc. Judge Michael was disqualified from participation in the case.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Traxler for the Court.

For the Court,

/s/ PATRICIA S. CONNOR
PATRICIA S. CONNOR
CLERK



**APPENDIX G**

FURNISHING EARNINGS INFORMATION
July 1995

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**SUPPLEMENTAL COAL ACT REVIEW INSTRUCTIONS #4**
**July 1995**

These instructions reflect the current policy, and are to be used in conjunction with POMS RM T01402ff and Supplemental Coal Act Review Instructions #1, #2 and #3.

**A. DETERMINING THE ASSIGNEE WHEN THE SIGNATORY OPERATOR IS INACTIVE**

Coal Act assignments, whenever possible, are made to the signatory operator that employed the miner in the coal industry. However when this is not possible because the signatory operator is inactive, then consider the following when determining the correct assignee.

1. If the signatory operator, or its "alter ego" (see Section B. below) is inactive;

Then make the assignment to the active person (company) related to the signatory operator that employed the miner in the coal industry (see Section C. below).

2. If the related person (company) is inactive;

Then make the assignment to the active "successor/successor-in-interest" ("successor") to:

a. a related person of the signatory operator; or if none

b. the signatory operator that employed the miner in the coal industry.

(See Section D. below.)

**B. AN "ALTER EGO"**

An "alter ego" is created when the same person(s) (company) controls the assets of a company following a *technical* change of identity or structure without any real change in ownership or management (e.g., the "alter ego" is, or stands in the place of, the signatory operator).

A business reorganization may have the appearance of creating a "successor" company when, in fact, there is no change in ownership. Therefore, the new company is merely an "alter ego" of the predecessor company.

Examples of an "alter ego" are:

- A sole proprietor who incorporates a business, but continues to control its operations.
- A company which changes its name, but continues to operate as before.

For assignment purposes under the Coal Act, treat an "alter ego" the same as you would treat its predecessor (e.g., as if there had been no change in ownership).



**C. A "RELATED PERSON"**

For purposes of the Coal Act, a "related person" (company) is a company that is:

- a member of a controlled group of corporations which includes the signatory operator; or
- a trade or business which is under common control with the signatory operator; or
- any other person who has a partnership interest (other than as a limited partner) or joint venture with a signatory operator in a business in the coal industry, if that business employed eligible miners.

In addition, the relationship had to have been in effect as of July 20, 1992 or, if earlier, the time immediately before the coal operator went out of business.

NOTE: A related person can also include a "successor" to one of the above entities, or a "successor" to the signatory operator.

**D. A "SUCCESSOR" OR "SUCCESSOR-IN-INTEREST"**

Addendum to POMS RM T01402.051, and Supplemental Coal Act Review Instructions # 3, Section O.

NOTE: This is a change-of-position on "successor company" policy, and is effective with decisions made on or after March 20, 1995.

Although there is a provision in the Coal Act for assignments to "successors" and "successors-in-

interest" to "related persons," the Coal Act does not specifically provide for assignments to "successors" or "successors-in-interest" to signatory operators. However, the Coal Act does permit assignments to "successors" and "successors-in-interest" to *defunct* (inactive) signatory operators.

Based on the above, "successors" and "successors-in-interest" are another type of "related person," and are to be treated as a "related person" for purposes of making assignments under the Coal Act. (Also see Section D.2. below.)

1. A "successor" (this includes the "successor-in-interest") is one who:

- by purchase, merger, consolidation, or other means of transfer, acquires substantial assets from another; AND
- continues running the same operation in the same location as the former owner with little or no interruption; AND
- uses many of the same employees who worked for the former owner.

NOTE: The difference between a "successor" and an "alter ego" is that with the former there is an actual change in ownership.

2. "Successors" are the lowest priority (last resort) among "related persons" of a signatory. Therefore, do *not* assign miners to a "successor" if the signatory operator is still in *any kind* of business at the time the assignment is made, or if there is a "related person" as defined in Section C. above.



3. If the signatory is inactive, but has both a "successor" and a non-successor "related person" (company) that are still active;

Then make the assignment(s) to the non-successor "related person" (company).

E. ASSIGNING TO THE "SUCCESSOR TO THE SUCCESSOR"

A "successor" to a signatory operator may also have a "successor." In fact, there can be a series of such "successors."

EXAMPLE: Company A sold its mining operation to Company G which continues the operation at the same site using most of the same employees. Company G is the "successor" to Company A. Company G then sells the mining operation to Company H which continues the operation at the same site using most of the same employees.

Based on this example, Company H is the "successor" to Company G's mining operation.

For assignment purposes (and using the above example), if Company A is "out of business," but Company G is "in business," then the miners who worked for Company A can be assigned to Company G as the "successor" to Company A. However, if both Company A and Company G are "out of business," then the miners who worked for Company A can be assigned to Company H (the "successor to the successor" of Company A).

## F. ASSUMPTIONS REGARDING "SUCCESSORS"

For assignment purposes, assume that inactive signatory operators do *not* have "successors" or "successors-in-interest," absent information to the contrary. However, if a "successor" or "successor-in-interest" issue is raised, and it is pertinent to the reassignment/review decision, request scouting from OCRO (e.g., obtain microfilm of the original wage reports for the inactive signatory and the "successor") to determine whether most of the former owner's employees were employed by the purchaser.

Other evidence of "successor relationships" can be found in State corporation records, remarks on the paper pre-1978 signatory list, and records maintained by the Fund.

## G. EXAMPLES OF "SUCCESSOR" RELATIONSHIPS

EXAMPLE 1: Company W sold its mining operation to Company X. Company X continues the mining operation at the same site using most of the same employees that Company W had used. Company W goes "out of business."

Based on this example:

- Company X is the "successor" to Company W, and is assignable for any eligible miners employed by Company W; AND
- Company W is *not* assignable under the Coal Act because it is "not in business."



EXAMPLE 2: Company W sold its mining operation at Mine A to Company X. Company X continues the mining operation at the same site using most of the same employees that Company W had used. Company W continues mining operations at Mine B and Mine C.

Based on this example:

- Company X is the "successor" to Company W's mining operation at Mine A; BUT
- Company W remains assignable under the Coal Act because it is "in business."

EXAMPLE 3: Same as in Example 2, except Company W sold its Mine B mining operation to Company Y and its Mine C mining operation to Company Z. Company W then goes "out of business." Companies X, Y and Z continue the mining operations at the respective sites, and use most of the same employees that Company W had used.

Based on this example:

- Company X is the "successor" to Company W's mining operations at Mine A, and is assignable for any eligible miners employed by Company W at Mine A;
- Company Y is the "successor" to Company W's mining operation at Mine B, and is assignable for any eligible miners employed by Company W at Mine B;
- Company Z is the "successor" to Company W's mining operation at Mine C and is assignable for

any eligible miners employed by Company W at Mine C; AND

- Company W is *not* assignable under the Coal Act because it is "not in business."

EXAMPLE 4: Company D (a pre-78 signatory) reorganized and created a new company within its organization (Company J). Company J (a 1978 and later signatory) conducted mining operations at a different site, and hired different employees. Company D remained "in business" but sold Company J to Company T on January 9, 1990. Company T continued the mining operation at the same site using most of the same employees that Company J used. Company J goes "out of business."

Based on this example:

- Company T is the "successor" to Company J, and is assignable under the Coal Act (priority #1) for those miners it and/or Company J employed;

- Company D is assignable under the Coal Act (priority #3) for those miners it employed; AND

- Company J is not assignable under the Coal Act because it went "out of business."

EXAMPLE 5: Same as Example 4, except Company J was sold to Company T on December 2, 1992.

Based on this example:

- Company D and Company J are related persons under the Coal Act;



- Company D is assignable under the Coal Act (priority #3) for those miners it and/or Company J employed;

- Company T (the "successor" company) is not assignable under the Coal Act because Company D (the related company) is "in business;"

- Company J is not assignable under the Coal Act because it went "out of business."

EXAMPLE 6: Company R (a pre-78 signatory) had both mining and non-mining operations. Company R reorganized all of its non-mining operations under one sister corporation (Company QR), and its mining operations under another sister corporation (Company SR). Thereafter, Company R ceased to exist in its original corporate form. Aside from this change in corporate structure, Company QR and Company SR continued to operate under the same ownership and management as Company R. Company SR became a 1978 and later signatory. Both Company QR and SR remain "in business." Based on this example:

- Companies QR and Company SR did *not* create "successor" relationships to Company R; AND

- Company R's reorganization constitutes a continuation of the same operations; AND

- Both Company QR and Company SR are the "alter ego" of Company R.

Therefore, covered work for Company R and Company SR would be assigned to Company SR for purposes of making assignments under the Coal Act.

NOTE: The non-mining operation (Company QR) is not considered for purposes of Coal Act assignments unless Company SR is "out of business" at the time an assignment(s) is made.

**H. PRIVATE AGREEMENTS BETWEEN SELLER AND BUYER**

SSA is not bound, for Coal Act assignment purposes, by any private agreement between the seller and the buyer of coal mining assets as to the reimbursements to be made to the seller for past liabilities. That is, if the buyer of the coal mining assets agrees to indemnify (assume responsibility for) or reimburse the seller for employee/retirement costs, this does not mean that the assignment should be made to the buyer instead of the seller.

**I. STATUS OF THE SELLER AFTER THE SALE**

The status of the seller after the sale of its mining operation/assets determines whether it is assignable under the Coal Act.

1. If the seller (or a related company) remains "in business," AND has the highest priority for assignment;

Then make the assignment to the seller (or the related company).

2. If the seller (and any related companies) is "out of business," AND sold all of its assets to the buyer;

Then evaluate the purchase agreement, and the other evidence, to determine whether the sale created a



"successor" relationship with the buyer; AND make the assignment based on your determination.

**J. DETERMINING WHERE TO MAIL NEW NOTICES OF ASSIGNMENT**

Several assigned operators have already authorized, in writing, representatives to act on their behalf in administrative matters under the Coal Act. Based on these authorizations, we have mailed requested earnings records (and the basis for the assignments), Coal Act review decisions and/or correspondence to these authorized representatives. However, the authorizations already in file:

- were received before any additional assignments were made;

- are based on current reviews; and

- pertain to the administrative review process only.

Therefore, mail all new notices of assignment to the assigned operator.

EXCEPTION: See Section J.2. below.

* * * * *

months of the time SSA sent the notice of assignment;

Then reopen and reverse the decision, and use the language provided in Supplemental Coal Act Review Instructions #3, Section X, Exhibit 2, item 6.

b. If the evidence does not clearly reflect that our records are in error AND the decision to reopen is

made after 12 months of the time SSA sent the notice of assignment;

Then deny the request to reopen, and affirm the decision. (Use the language provided in Supplemental Coal Act Review Instructions #3, Section X, Exhibit 2, item 6.)

6. Assignee Alleges a "Successor Relationship" is Involved

Reopen and change the assignment/review decision if the assignee requests a reopening based on a "successor relationship" as clarified in Section D above—provided the assignment would have been made to the "successor" company under this clarification.

Also, reopen and change the assignment if you determine that a "successor relationship" is involved, AND the assignment would have been made to a "successor" company under this clarification.

NOTE: A "successor relationship" includes "successors" and "successors-in-interest."

**M. UNDELIVERABLES**

It is SSA's role to make assignments and review decisions, and to mail the appropriate notices to the assignees. It is the Fund's role to bill the assignees and collect the premiums.

(2)

No. 00-1307

Supreme Court, U.S.
FILED
MAR 20 2001
CLERK

# In The Supreme Court of the United States

**WALTER A. HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY,**

*Petitioner,*

**v.**

**SIGMON COAL COMPANY, INC. and JERICOL MINING, INC.,**

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Commissioner of Social Security violates section 9701(c)(2) of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701(c)(2), by assigning beneficiaries in the UMWA Combined Benefit Fund to the successor in interest of the signatory operator that actually employed the beneficiaries.

## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The caption of the case contains the names of all the parties. Respondents, Sigmon Coal Company, Inc. and Jericol Mining, Inc., have no parent or subsidiary corporations that require disclosure under Supreme Court Rule 29.6.



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No. 00-1307

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER A. HALTER, ACTING
COMMISSIONER OF SOCIAL SECURITY,
Petitioner,
v.
SIGMON COAL COMPANY, INC. AND
JERICOL MINING, INC.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner asks this Court to review the Fourth Circuit's decision in *Sigmon Coal Co. v. Apfel*[1] applying the plain language of section 9701(c)(2) of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). 26 U.S.C. § 9701(c)(2). In *Sigmon Coal*, the Fourth Circuit invalidated as

[1] *See Sigmon Coal Co. v. Apfel*, 33 F. Supp. 2d 505 (W.D. Va. 1998), *aff'd*, 226 F.3d 291 (4th Cir. 2000), *reh'g denied* (Nov. 15, 2000)(en banc)(decisions appended to Petitioner's Brief at 65a - 78a, 1a - 44a, 81a - 82a)("Pet. Appdx. at __").

unlawful 86 Coal Act assignments the Commissioner of Social Security (Commissioner or SSA) made to Respondent Jericol Mining, Inc. Section 9701(c)(2) defines specific relationships which, if shown to exist, authorize the Commissioner to assign to a so-called "related person" responsibility to pay annual statutory health care premiums covering certain union-represented retired miners (and their eligible dependents) based on the related person's carefully defined relationship (as of a date certain) to the statutorily defined "signatory operator," *see* 26 U.S.C. § 9701(c)(1), that actually employed the miner. This "related person" definition, however, plainly does not include language authorizing such beneficiary assignments to be made to a successor in interest to the signatory operator.

Petitioner's primary argument is that (i) the Fourth Circuit erred when it applied the language of section 9701(c)(2) as written, because a plain reading of the related person definition purportedly yields an absurd result; and, (ii) the court's rejection of the Commissioner's absurd result argument has created an intolerable circuit split.

As Respondents demonstrate below, however, the statutory construction argument was correctly decided by the Fourth Circuit. More significantly, the recent circuit split on this discrete statutory interpretation issue is tolerable and deserving of percolation as its potential private party and programmatic consequence is at best marginal and limited. Accordingly, the Court's resources are thus best served by not



elevating the instant petition or the *Aloe Energy*[2] petition to its discretionary docket, a docket necessarily reserved for 90 or so of the most meritorious cases screened each term.

## STATEMENT

Between 1993 and 1997 the Commissioner assigned Respondent Jericol Mining, Inc. (Jericol) Coal Act premium responsibility for 103 retired UMWA-represented coal miners (and their dependents) eligible to receive health benefits from the UMWA Combined Benefit Fund (UMWA Combined Fund). The Commissioner assigned each of these beneficiaries pursuant to the third tier, *see* 26 U.S.C. § 9706(a)(3), of Congress's three-tiered assignment priority. 26 U.S.C. § 9706(a)(1)-(3); *see generally Eastern Enters. v. Apfel*, 524 U.S. 498 (1998)(invalidating third-tier assignments made by the Commissioner to an assigned operator that had never signed the

[2] The Solicitor General's suggestion, *see* Pet. at 15, that the Court shelve the instant petition while it screens an application the Solicitor General's office did not oppose, s*ee Aloe Energy Corp. v. Apfel*, No. 99-3915 (3rd Cir. June 20, 2000), *petition for cert. filed* (U.S. Nov. 2, 2000)(No. 00-725), unnecessarily suppresses debate on the threshold issue of whether the identical issue of statutory construction presented in *Aloe Energy* and *Sigmon Coal* is of such moment as to merit the Court's discretionary review. Respondents therefore request the Court to screen these applications in tandem when *Aloe Energy* is redistributed for Conference.

watershed 1974 (or later) national coal wage agreement with the UMWA).[3]

In fact, only 17 of the assigned miners actually worked for Jericol; the other 86 (the Shackleford Retirees) last worked for an unrelated company, Shackleford Coal Company (Shackleford). *Sigmon Coal*, 226 F.3d at 305 ("Jericol never actually employed any of the miners at issue.") (Pet. Appdx. at 29a). Notwithstanding that Shackleford did not sign the watershed 1974 coal wage agreement and that the 86 miners retired from employment with Shackleford prior to June 1973 when Shackleford sold to Jericol the facility where they had

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[3] In an attempt to distance Jericol's factual situation from the third-tier Coal Act assignments the Court reviewed and found unconstitutional in *Eastern Enterprises*, the Solicitor General misreads the agency correspondence and applicable judicial decisions, asserting erroneously that the instant case "does not involve assignments made under the third tier." Pet. at 5-6 n.2. *But see* Pet. Appdx. at 59a ("Since Shackleford is a pre-[19]78 [coal wage agreement] signatory and employed the miner for more than 24 months the assignment must be made under category three"); *Sigmon Coal*, 33 F. Supp. 2d at 507 (Pet. Appdx. at 69a)("This assignment was based on 26 U.S.C. § 9706(a)(3).").

The only reason *Eastern Enterprises* is not "directly relevant to this case," *see* Pet. at 6 n.2, is that *at this juncture* Respondents' supplemental complaint averring that the 86 third-tier Coal Act assignments at issue cross the constitutional line drawn by the Court has been held in abeyance pending the ultimate disposition of the single issue of statutory construction resolved in Respondents' favor below. *See Sigmon Coal*, 33 F. Supp. 2d at 506 (Pet. Appdx. at 66a).



worked, in assignment notices directed to Jericol in the mid-1990s SSA stated that it had allocated the Shackleford Retirees to Jericol due to its purported status as a successor or a successor in interest to the long-defunct Shackleford Coal Company.

After SSA rejected Jericol's administrative challenges, Respondents filed suit in the United States District Court for the Western District of Virginia. On November 18, 1998, Senior District Court Judge Glen Williams granted summary judgment in their favor and ordered the challenged assignments withdrawn consistent with his finding that the Coal Act does not provide "for liability to be laid at the door of successors of defunct signatory operators." *Sigmon Coal*, 33 F. Supp. 2d at 509 (Pet. Appdx. at 74a). After full briefing and oral argument by the parties (and by Amici Trustees of the UMWA Combined Fund) the Fourth Circuit affirmed, *see Sigmon Coal*, 226 F.3d at 309 (Pet. Appdx. at 36a), and subsequently denied the Commissioner's suggestion for rehearing (supported by Amici) on November 15, 2000. (Pet. Appdx. at 81a - 82a).

## REASONS FOR DENYING THE WRIT

### 1. Discretionary Review Is Unwarranted Because The Court Below Properly Applied The Plain Language Of The Coal Act's Definitional Provision.

Since the statutory language is plain on its face, *Chevron One* is fully dispositive here. *See Chevron U.S.A., Inc.*

*v. NRDC, Inc.*, 467 U.S. 837 (1984).[4] The Commissioner's resort to the agency's evolving interpretative guidelines (issued without the benefit of notice and comment rulemaking), *see* Pet. Appdx. at 83a - 94a, to overcome Congress's plain and unambiguous definitional language to justify assigning Coal Act beneficiaries to a purported successor in interest of a signatory operator is arbitrary and plainly exceeds the scope of his delegated authority. As the Fourth Circuit held, application of the plain language does not lead to an inexplicable or absurd result.[5] Congress and Congress alone has the power to amend the "related person" definition in section 9701(c)(2) to provide

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[4] Respondents are not aware of a single court (or judge) that has construed the related person definition to be ambiguous. *See, e.g., R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 894 (D.C. Cir. 1999) ("We are unable to quarrel with the district court's conclusion that the agency's construction of the related person definition is 'tortured.'").

[5] *Compare Sigmon Coal*, 226 F.3d at 307-308 (Pet. Appdx. at 33a - 34a)(recognizing as "certainly plausible" Respondents suggestion that "in an industry where buying and selling coal mining assets is commonplace, [holding successors in interest to defunct signatory operators liable for Coal Act assignments based on the coal operator's employment relationships dating back in some cases to the 1940s] would present a significant impediment to the coal companies' support for the Coal Act, which, in turn would supply Congress with a motive for omitting the provision" *with R.G. Johnson*, 172 F.3d at 895 ("When we asked counsel for [R.G.] Johnson if she could provide any plausible reason why Congress should have intended such an exemption, the only explanation she was able to suggest was that coal mining operators had more effective lobbyists in Washington. . . . We find this explanation less than compelling.").



for liability to be laid at the door of successors of defunct signatory operators.

The unusual and contentious manner in which the Coal Act was shepherded through Congress as part of the Energy Policy Act of 1992 reinforces the principle that, subject to constitutional considerations, reviewing courts are to give effect to the law as written and leave to the legislature the task of overriding through amendment otherwise clear statutory language.[6] The Energy Policy Act of 1992 was enacted on October 20, 1992. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992). This legislation was the culmination of 20 months of crafting, deliberations and compromise, and was heralded as a comprehensive response to the country's energy issues. *See generally* Jim Rossi, *Lessons from the Procedural Politics of the Comprehensive Energy Policy Act of 1992*, 19 Harv. L. Rev. 195 (Winter, 1995) (hereinafter "Rossi"). No less than twelve separate congressional committees exercised jurisdiction over this important legislation and no less than 100 members of the House and Senate served as conferees for purposes of hammering out the final language in the legislation's twelve

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[6] *See, e.g.*, 146 Cong. Rec. S3835 (daily ed. May 10, 2000)(printing for the record S.2538 -- the Coal Miner and Widows Health Protection Act of 2000 -- which at Sec. 4(a) provided as follows: "The last sentence of section 9701(c)(2)(A) of the Internal Revenue Code of 1986 (defining [Coal Act] related person) is **amended** to read as follows: 'A related person shall also include . . . a successor in interest of the signatory operator itself.'")(emphasis added).

separate titles. 138 Cong. Rec. H11405 (daily ed. Oct. 5, 1992)(statement of Rep. Brown). These titles addressed such wide ranging and hotly contested issues as electricity deregulation, nuclear power licensing and waste storage, global warming, and synthetic fuel subsidies. *Id.*

The Coal Industry Retiree Health Benefit Act of 1992 was included in the Senate version of this comprehensive energy package in late July 1992 as special interest legislation designed to remedy the provision and funding of health benefits for certain retired union coal miners.[7] Codified as an amendment to the Internal Revenue Code of 1986, 26 U.S.C. §§ 9701- 9722, this title of the Energy Policy Act of 1992 was meticulously crafted to garner a consensus among the many

[7] The Coal Act constituted a fundamental, though purposefully discrete, departure from federal labor policy because from 1947 until 1992 the terms and conditions pursuant to which coal operators that employed UMWA-represented workers agreed to pay monies dedicated to their former employees' health benefits was hammered out in private party negotiations. *See generally Eastern Enters.*, 524 U.S. at 2150. As of 1992, however, there was serious and growing concern that these privately bargained-for benefits would be interrupted, suspended or terminated, prompting a nationwide strike in the coal fields. *See generally McGlothlin v. Connors*, 142 F.R.D. 626, 631 (W.D. Va. 1992)(noting that on January 6, 1992 the Trustees of the UMWA Health and Retirement Funds informed the Bituminous Coal Operators' Association that they intended to "notify the beneficiaries of each of the benefit plans on or about March 1, 1992, that there will be insufficient funds to assure payments for future covered services and that payments will therefore be suspended until such additional funding is provided.").



interested groups affected by this particular legislation.[8] Rossi, *supra* at 217 - 222.

Notwithstanding the evolution of this compromise legislation, the Solicitor General urges review of the Fourth Circuit's refusal to insert language in section 9701(c)(2) to expand the statutorily defined universe of Coal Act "related persons" to include "a successor in interest of a signatory operator." Judges, however, are properly reticent to re-legislate a clear definitional provision even when confronted by the inevitable claim, as advanced by the Commissioner (and Amici

[8] The "compromise" UMWA retiree health benefit financing language was approved as an amendment to H.R. 776 on the Senate floor on July 29, 1992. *See generally* 138 Cong. Rec. S10783 (daily ed. July 29, 1992)(statement of Sen. Rockefeller)("During the last few weeks I have been involved in intense and lengthy negotiations on this legislation. We have debated arcane points of law and obscure data about every facet in the coal industry. . . . This has been one of the most contentious pieces of legislation I have worked on in the Senate. I have said from the beginning that my goal was to protect the health care of retired coal miners and their families, and that I was not wedded to the details of how to do it. . . . The current approach is the one sought by the [Bush] administration and in the end it appeared to be the one most likely to command a consensus in the legislative process."); *see also* 138 Cong. Rec. S10784 (daily ed. July 29, 1992)(statement of Sen. Wallop)("I believe that the resolution which we have arrived at is as fair as we could possibly make it. . . . In this resolution, all of us wish there were some little piece of it that we could have left as originally drafted, or not have included even as drafted. But, having said that, I think it shows the best traditions of the Senate that a resolution to a very sticky, very thorny problem was arrived at in as fair and equitable a manner.")

Trustees of the UMWA Combined Benefit Fund) below, that Congress's unambiguous language creates inequities, fosters absurd results or frustrates overarching legislative intent. *See Crooks v. Harrelson*, 282 U.S. 55, 60 (1930); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570-71 (1982)(where the intent of Congress is expressed in the text of a statute in reasonably plain terms reviewing courts must give effect to that intent as the text of the statute is the most persuasive evidence of Congress's intent).

*Crooks* and its Coal Act progeny[9] control the inquiry here. In *Crooks*, a decedent's executors claimed that provisions in section 402 of the tax code were incongruous, should be

[9] *See, e.g., Dixie Fuel Co. v. Apfel*, 171 F.3d 1052, 1063 (6th Cir. 1999)(holding that the plain language of the statute "is the end of the matter," while enjoining certain assignments to a purported related person as in excess of the SSA's delegated authority and rejecting as "misguided" the Commissioner's attempt to create an ambiguity in the plain and unambiguous language of section 9706(a) of the Coal Act); *Fawn Mining Corp. v. Hudson*, 80 F.3d 519, 522 (D.C. Cir. 1996)(refusing to rewrite or recast reasonably clear Coal Act definitional language while lingering briefly in order to reject ambiguities allegedly lurking in the text of section 9703(f) and the invitation to read the statute through the lens of equity as "blatantly rewriting" the statute). *National Coal Ass'n v. Chater*, 81 F.3d 1077, 1081-1082 (11th Cir. 1996)(holding the statutory premium calculation formula in section 9704(b)(2) of the Coal Act is clear on its face, while invalidating the Commissioner's prior determinations of the annual, per-beneficiary health benefit premium as unlawful miscalculations, and rejecting the agency's claim that its reading of Congress's statutory formula was compelled by the statute's overrarching purposes).



rejected as "leading to absurd results" and further urged the Court, as does Petitioner here, to adopt a construction supposedly "in harmony" with the spirit and purpose of the law. *Crooks*, 282 U.S. at 59. The Court declined this invitation to override the legislature's plain language, underscoring that "[u]nless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it has done so in plain terms . . . . it is not within the province of the court to modify the law by construction."[10]

This division of authority between coordinate branches must apply with particular force where, as here, the legislative history, *see supra* n.8, and contemporaneous extra-textual sources[11] underscore that the statute in question resulted from

[10] *Id.* at 61. Like the federal estate tax provisions at issue in *Crooks*, the Coal Act is housed in the Internal Revenue Code, and every appellate court that has addressed the issue has found Coal Act premiums are taxes. *See, e.g., In re Chateaugay*, 53 F.3d 478, 498 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995); *Pittston Co. v. United States*, 199 F.3d 694, 702 (4th Cir. 1999); *In re Sunnyside Coal Co.*, 146 F.3d 1273, 1276-80 (10th Cir. 1998).

[11] *See* Holly Idelson, *Bill to Set National Policy Remains Blocked Over Coal-Tax Provision*, 50 Cong. Q. Wkly. Rep. 2166 (July 25, 1992) (describing key senators closeted even after scheduled 7:20 p.m. cloture vote on the energy bill in the offices of the Senate president pro tempore with a "cluster of lobbyists outside" speculating that a deal was at hand only for key players to emerge to cast opposing votes on the cloture petition); Holly Idelson, *Bills to Cut Oil Dependence Finally Head to Conference*, 50 Cong. Q. Wkly. Rep. 2261 (Aug. 5, 1992)("Negotiators worked through the weekend to reach an accord on the coal issue and by July 28 were confident a deal was set. . . . But even as senators began the 93-3 cloture vote, the coal

difficult legislative compromises. Perhaps the most compelling evidence of the fragile Senate compromise which enabled the Coal Act (and the eleven other titles of the Energy Policy Act of 1992) to become law is found in the contemporaneous remarks of House conferees who found themselves barred from correcting **any** language in the UMWA retiree health benefit title of the energy bill submitted to conference by the Senate. As then-Chairman of the House Ways and Means Committee Dan Rostenkowski lamented on the floor of the House on October 5, 1992:

> The House conferees are very uneasy with the provision included in the Senate bill for financing these [retiree] benefits. It appears to create numerous inequities among the companies that will be required to pay for these benefits, and could set an unfortunate precedent for legislating a solution to what is in essence a private dispute.
>
> Yet in spite of these seemingly major and perhaps fatal flaws in their amendment, the Senate presented this to the House conferees on a take-it-or-leave-it basis – threatening defeat of the most comprehensive energy legislation in years if even the smallest problem were corrected by House conferees. The House conferees were prevented from undertaking good faith negotiations on the enumerable problems with the Senate version which have been brought to our attention.

*See* 138 Cong. Rec. H11408 (daily ed. Oct. 5, 1992) (statement of Rep. Rostenkowski).

Respondents concur with Chairman Rostenkowski's observation concerning numerous inequities and major flaws in the Coal Act. However, these comments foreshadow the wisdom of judicial forebearance when invited to ignore clear statutory language. Not only does a court risk running roughshod over delicate political compromises when it re-writes plain language, the doors are swung open to judicial correction of every harsh, odd or inconsistent consequence that flows from application of every plain directive in the statute.

### 2. Review Is Unwarranted Because The Recently Emerged Split Among The Circuits Is Neither Over An Issue Of Sufficient Importance Nor Profound.

The simple existence of a conflict among the federal circuit courts of appeals is not necessarily sufficient, standing alone, to warrant exercise of the Court's certiorari jurisdiction. *See generally* Robert L. Stern et al., *Supreme Court Practice* at 168-173 (7th ed. 1993). Rather, the Court's jurisdiction is properly reserved to resolve important issues of federal law, and

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deal was unraveling. It took until about 11 that night to resolve the snag, finally clearing the way for floor consideration of the energy bill the next day.").

then only when the circuit split on an important issue is profound or widespread. *Id.* at 170-171. The instant case fails to meet either criteria.

**a. This Case Does Not Present An Important Issue of Federal Law.**

The Solicitor General suggests that the issue in the *Aloe Energy* petition (and hence the issue decided against the Commissioner in *Sigmon Coal*) is among the 90 or so this term that merit the Court's discretionary review. Yet, as discussed below, the split among the circuits as to whether the Coal Act "related person" definition should be judicially amended does not present an important issue of federal law for two reasons. First, the split involves an issue that has little practical implication. Second, the split will not likely recur or substantially affect future conduct of private parties or the Government.

The decision below, like the contrary decisions that preceded it in *R.G. Johnson* and *Aloe Energy*, involved only a question of which among several potentially liable parties would be responsible for bearing the cost of health benefits for a small number of UMWA retirees eligible to receive health benefits from the UMWA Combined Fund.

First, the outcome of the Commissioner's allocation of financial responsibility has absolutely no impact on these retirees. They will receive their health benefits from the UMWA Combined Fund regardless of where the allocation comes to rest. Thus, to the 50 or so UMWA retirees SSA



collectively assigned R.G. Johnson and Aloe Energy, and the 86 retirees formerly assigned to Respondent Jericol, the split is meaningless.

Second, the split should likewise be of no moment to the UMWA Combined Fund. It will continue to be reimbursed for the costs it incurs in providing these beneficiaries' health benefits, from an assigned operator or, if they cannot be assigned to an operator, from other sources of funds made available by Congress.[12]

Third, the split has, at best, a negligible impact on SSA's implementation of its one-time Coal Act assignment task. Congress directed SSA to complete the task of making beneficiary allocations (including all allocations based on related person status) prior to October 1, 1993. 26 U.S.C. 9706(a); *see generally Dixie Fuel*, 171 F.3d at 1064 (enjoining

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[12] In the case of assigned beneficiaries, the responsible operator pays an annual per-beneficiary health benefit premium to the UMWA Combined Fund set by SSA pursuant to the formula codified in section 9704(b). In the case of unassigned beneficiaries, the UMWA Combined Fund receives transfer payments from the overfunded UMWA 1950 Pension Plan, or from annual interest generated on monies paid by coal operators and held by the U.S. Department of the Interior's Abandoned Mine Reclamation Fund. 26 U.S.C. § 9705; 30 U.S.C. § 1232(h)(3)(A). As a fallback (and to date untapped) measure, the Coal Act provides that all assigned operators may be assessed a pro rata premium, if necessary, to ensure that the UMWA Combined Fund receives the amount needed to pay for unassigned beneficiaries' health benefits. 26 U.S.C. § 9704(a)(3), (d); *See Eastern Enters.*, 524 U.S. at 514 n.3 (unassigned beneficiary liability thus far been covered through transfer of funds from other sources).

as *ultra vires* assignments initially made to a purported related person beginning in 1995 while holding that the Commissioner's authority to make initial Coal Act assignments expired on September 30, 1993). Furthermore, the total pool of eligible beneficiaries Congress charged SSA with assigning in 1993 was fixed by statute as of July 20, 1992. 26 U.S.C. § 9703(e); *Fawn Mining*, 80 F.3d at 522. Therefore, assignments which implicate application of the Coal Act related person definition occurred (or should have occurred) more than seven years ago.

This notwithstanding, the Solicitor General now suggests that SSA "believes" that a "substantial number" of the some 16,500 related person assignments involve the Commissioner's attempt to lay Coal Act liability at the door of successors in interest of defunct signatory operators. *See* Pet. at 14 n.4. Respondents submit the exercise of the Court's certiorari jurisdiction requires more than an applicant's carefully couched belief where, as here, the suggested facts were never submitted for the record, let alone tested in discovery, and where seven years into the statutory scheme the very cases the Commissioner proffers as evidence that the issue has "spawned" litigation and is of significant and recurring importance have all been settled (apparently on the Government's initiative) and removed from active court dockets.

For example, just last July in the *Aloe Energy* case the Commissioner filed a motion to publish after the panel issued its unpublished decision. In moving the court for full-text



publication of its non-precedential ruling, the Commissioner referenced the decision in *R.G. Johnson* and the *Sigmon Coal* case and additionally observed:

> The Commissioner's Coal Act assignment decisions have spawned at least two other cases involving this issue, *see Sager Coal Co. v. Apfel*, Civil Action No. 96-1107 (W.D. Pa.), and *Fayette Fuel, Inc. v. Apfel*, Civil Action No. 96-2209 (W.D. Pa.), and the issue appears to be involved in a case recently filed in the Western District of Virginia, *see Humphrey's Enterprise, Inc. v. Commissioner of Social Security*, Civil Action No. 2-00-CV-00022. The Commissioner believes there to be a strong likelihood, given the number and complexity of the Coal Act assignments he has made and continues to make, that further cases involving this issue will continue to arise.

Commissioner's Motion for Publication of Memorandum Opinion, filed July 5, 2000, at 2-3, *Aloe Energy Corp. v. Apfel*, No. 99-3915 (3rd Cir. June 20, 2000)

These assertions do not bear the weight attributed them. Third Circuit docketing records confirm that *Sager Coal* and *Fayette Fuel* were both dismissed through a joint stipulated settlement in the fall of 1998 based on the Commissioner's representations that Coal Act assignments to these companies were void *ab initio* in the wake of the Court's ruling in *Eastern Enterprises*. Fourth Circuit docketing records confirm that

*Humphrey's Enterprises* was resolved through a joint stipulated settlement several months after the Commissioner's motion to publish was denied. The dearth of pipeline litigants some seven years into the statutory scheme underscores that uniform interpretation of section 9701(c)(2) does not rise to the level of importance warranting the Court's discretionary review.

If, as the Solicitor General intimates, *see* Pet. at 13-15, this issue is of potential programmatic consequence, then it should be considered further by the federal courts of appeals who now have, unlike the Third Circuit panel in *Aloe Energy Corp., v. Apfel*, No. 99-3915 (3rd Cir. June 20, 2000), the benefit of the Fourth Circuit's consideration of this statutory provision. *See Sigmon Coal*, 226 F.3d at 307-308 (Pet. Appdx. at 32a - 35a). On the other hand, if, as Respondents suggest, the importance of the circuit split on this statutory interpretation issue is marginal and limited in its potential consequences, then there will be no further cases to consider, which in itself will demonstrate that the issue does not merit this Court's attention.

Finally, even if the underlying split is important to Aloe Energy, R.G. Johnson and Respondents, it is of limited importance to the many other private parties that are subject to the Coal Act. Whether or not certiorari is granted to resolve the split, the impact of these three decisions on the conduct of private parties in the future would appear to be *de minimus*.



**b. The Split Among The Circuits Is Not Profound Or Widespread.**

Even if the split involved an important issue of federal law, it is not profound or widespread. The unpublished, non-precedential decision in *Aloe Energy* essentially adopted, without analysis, the *R.G. Johnson* rationale.[13] Thus, the split effectively exists only between two circuits with no other courts having had the opportunity to weigh in on the issue with a controlling opinion.

*R.G. Johnson*, the only published and therefore precedential decision in conflict with *Sigmon Coal,* is apparently no closer to final judgment now than it was nearly two years ago when the District of Columbia Circuit ruled in the Government's favor. The court remanded the case for further proceedings on the question of whether the pre-Act

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[13] The decision in *Aloe Energy* illustrates why the split is not profound. There a panel of the Third Circuit, in accordance with its internal operating procedures, specifically tracked the case as one having "no institutional or precedential value," took the case under advisement on the briefs without the benefit of oral argument, and issued its slip opinion stamped with the requisite and unmistakable disclaimer "UNREPORTED - NOT PRECEDENTIAL." It is a matter of public record that in *Aloe Energy* the panel denied the Commissioner's motion to publish after docketing Aloe Energy's brief, which opposed the motion on the ground that the case was properly designated as one having "no institutional or precedential value." *See* www.pacer.ca3.uscourts.gov (compiling *Aloe Energy* docketing information through the PACER system's established Third Circuit Internet site). Under these circumstances it is odd that *Aloe Energy* is now touted as a critical case deserving of the Court's discretionary review.

purchase of an operation in an arm's length transaction actually makes the transferee a successor in interest of the kind contemplated by the statutory definition. *R.G. Johnson*, 172 F.3d at 89; *see, e.g., In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 (4th Cir. 1996), *cert. denied*, 520 U.S.1118 (1997)("Should the successorship issue arise in a future case brought before us, we may then have to determine whether the last two words in the phrase 'successsor in interest' are meaningless or redundant.").

Indeed, the same issue remains open in the instant case, because the district court below did not reach the question of whether, in the first instance, Jericol's purchase of assets in 1973 made it a successor in interest to Shackleford Coal Company. *Sigmon Coal*, 33 F. Supp. 2d at 510 (Pet. Appdx. at 76a) (" it is not necessary for the court to determine what the term means."). Respondents here have also preserved a constitutional claim that the underlying assignments offend the Fifth Amendment in the wake of the Court's ruling in *Eastern Enterprises*. *See supra* n.3. Since the parties may prevail on alternative legal theories, the newly emerged split between the District of Columbia Circuit and the Fourth Circuit is not concrete because it does not involve litigants whose rights and liabilities would be fixed, even if the Court were to grant the petition.

It is also possible that the District of Columbia Circuit could reverse its position should another case presenting the same Coal Act related person issue arise in that Circuit. Significantly, the split panel in *R.G. Johnson* did not have



before it a plausible explanation for why Congress might have intentionally excluded successors in interest to a signatory operator from the Coal Act's "related person" definition. *See supra* n.5. Given the more extensive discussion of this very issue in *Sigmon Coal*, the D.C. Circuit (and for that matter the Third Circuit, which adopted the *R.G. Johnson* rationale in an unpublished opinion before *Sigmon Coal* was decided) could reconsider its position on this point.

## CONCLUSION

Petitioner's application should be denied because it does not present an important question of federal law and because the newly emerged split among the federal circuits on the scope of the Coal Act's related person definition is tolerable and not profound.

Respectfully submitted.

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No. 00-1307

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER A. HALTER, ACTING
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

SIGMON COAL COMPANY, INC. and
JERICOL MINING, INC.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

# Respondents' Opposition To Motion Of The Trustees Of The UMWA Combined Benefit Fund For Leave To File Brief As *Amici Curiae* In Support Of Petitioner

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## CORPORATE DISCLOSURE STATEMENT

Respondents, Jericol Mining, Inc. and Sigmon Coal Company, Inc., have no parent or subsidiary corporations that require disclosure under Supreme Court Rule 29(6).

No. 00-1307

IN THE
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WALTER A. HALTER, ACTING
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**Respondents' Opposition To Motion Of The Trustees Of The UMWA Combined Benefit Fund For Leave To File Brief As *Amici Curiae* In Support Of Petitioner**

Respondents, Jericol Mining, Inc. and Sigmon Coal Company, Inc., pursuant to Rule 37(5) of the Rules of the Supreme Court of the United States, object to the Motion of the Trustees of the UMWA Combined Benefit Fund for Leave to File a Brief as *Amici Curiae*. For the reasons noted below, Respondents have not consented to the filing of the *amici curiae* brief and in such circumstances the filing of a *amici curiae* brief is not favored. Rule 37(1) and (2)(b). As set forth below, the brief attached to *Amici*'s motion presents a familiar parade of horribles without adding any relevant matter not already brought to the attention of the Court by the Solicitor General.

**OBJECTIONS**

1. *Amici* have no independent stake in this matter. The UMWA Combined Benefit Fund ("Combined Fund") will suffer no adverse consequence whether or not the Petition is granted, and whether or not the decision below is affirmed. The Coal Act's financing mechanisms ensure that the Combined Fund will obtain full reimbursement of all covered health care expenditures to date (and in the future) for the 86 UMWA retirees ("Shackleford Retirees") that the courts below held were unlawfully assigned to Respondent Jericol Mining, Inc.[1]

2. *Amici* assert that the decision below has prevented the Combined Fund from collecting the balance of the premiums owed by Respondents,[2] and, "if permitted to stand, will create inconsistency in the Combined Fund's application of the Coal Act." *Amici* Brief at 2. Respondents note that *Amici*'s role under the statutory scheme is limited to administering the delivery of health benefits to a fixed and declining group of UMWA retirees, benefits funded by collecting premiums covering the *assigned* beneficiaries from their former union employers

[1] *See generally* Respondents' Brief in Opposition to Petition for a Writ of Certiorari ("Respondents' Opp.") at 15 n.12 (funds Congress made available under the provisions of 26 U.S.C. §§ 9705(a) and (b) for transfer to the Combined Fund from an overfunded UMWA pension plan and from interest generated on a reclamation tax imposed on coal operators serve to reimburse *Amici* for the actual health benefit expenditures of unassigned Combined Fund beneficiaries); *Holland v. Virginia Lee Co.*, 188 F.R.D. 241, 245 (W.D. Va. 1999).

[2] *Amici*'s suggestion that Respondents have failed to pay the Combined Fund premiums they owe, *see Amici* Brief at 2, is unwarranted. In fact, other than the 86 assignments of the Shackleford Retirees voided by the court below, Jericol has paid all statutory premiums *Amici* have assessed since 1993 for the UMWA retirees assigned to Jericol based on their actually having been employed by Jericol. *Amici* fails to point out that the Combined Fund has a statutory entitlement to reimbursement from the Abandoned Mine Land Reclamation Fund administered by the Secretary of the Interior for costs it incurs on behalf of unassigned beneficiaries, including the 86 Shackleford Retirees. If the Combined Fund has failed to seek such reimbursement, that responsibility rests with *Amici*, not with the decision below.

and by annually invoicing the Abandoned Mine Land Reclamation Fund for costs incurred in providing health benefit coverage to the *unassigned* beneficiaries. *Virginia Lee Co.*, 188 F.R.D. at 244. Therefore, no action which reallocates Combined Fund beneficiary assignments (whether taken by the executive branch official charged with making Coal Act assignment allocations, *see* 26 U.S.C. § 9706(a), or by judges empowered to review such agency decisions, *see* 26 U.S.C. § 9706(f)(5)), can possibly "create inconsistency in the Combined Fund's application of the Coal Act."

3. *Amici* nonetheless suggest that their motivation is "to ensure that the base of contributing employers remains as broad as possible, so as to prevent an ever-increasing burden from falling on an ever-declining group of employers, which, in turn, could lead to a repeat of the crisis that Congress sought to resolve when it enacted the Coal Act in the first place." *Amici* Brief at 2-3. However, the spectre of a vicious downward spiral and drastic erosion of the funding base (and accompanying allegations concerning the Combined Fund's future financial ruin) rings hollow, just as it did in 1997 when *Amici* invoked the "ever-increasing . . . ever-declining" mantra in unsuccessfully seeking this Court's review of another decision involving allocation of Coal Act liability to a purported successor.[3] For in the eight years since the

[3] *See In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 586 (4th Cir. 1996), *cert. denied*, 520 U.S. 1118 (1997)(rejecting the Combined Fund's argument that the lower court decision "has set the stage for the same kind of funding crisis that prompted the enactment of the Coal Act" while noting the argument is "insufficiently persuasive to disturb the statutory scheme as we have found it," and that the Fund's concerns are "probably most appropriately addressed to Congress."); *see also* Petition for a Writ of Certiorari at 26, *UMWA 1992 Benefit Plan & UMWA Combined Benefit Fund v. Leckie Smokeless Coal Co.*, No. 96-1117 (U.S. filed Jan. 14, 1997), *reprinted in* Vol. 282 S. Ct. Transcripts of Records and File Copies of Briefs (1996 Term)("*Leckie* Petition")("Unless this important and recurring issue is resolved by this Court, the existing conflict among the courts of appeal . . . will cause systematic elimination of the funding source for retiree health benefits that Congress sought to protect when it enacted the Coal Act.").



Coal Act was enacted in 1992, no assigned operator has been required to pay health care premiums for anyone other than its own assigned beneficiaries. Moreover, no new UMWA retirees will be added to this closed group, *see* 26 U.S.C. § 9703(e), which predominantly consists of Medicare-eligible seniors and is subject to a significant mortality curve. *Compare McGlothlin v. Connors*, 142 F.R.D. 626, 632 (W.D. Va. 1992)(initial beneficiary population of approximately 120,000), *with* 138 Cong. Rec. S3835 (daily ed. May 10, 2000) (statement of Sen. Rockefeller)("There are now only about 65,000 miners and retirees remaining in the [Combined] Fund . . . . Their average age is 78 years old, and more than 45% of the population is over 85 years .").

4. *Amici* press for review of the decision below on the familiar grounds that "the conflict in the circuits [may] greatly jeopardize[] the provision of Combined Fund benefits to the beneficiaries whom the Coal Act is intended to protect." *Amici* Brief at 4; *see Leckie* Reply Brief for Petitioners at 2 (filed Feb. 25, 1997), *reprinted in* Vol. 282 S. Ct. Transcript of Record and File Copies of Briefs ("Review by this Court is needed to resolve the conflict in the courts of appeal and to correct errors below before serious harm is done to the Combined Fund . . . and the many thousands of [beneficiaries] the Coal Act was intended to protect."). *Amici*'s assertion plainly carries far less weight now than it did in 1997 in *Leckie Smokeless*. At least there *Amici* could themselves point to 34 cases involving 10,100 beneficiaries and projected future health care costs "for such a large number of beneficiaries total[ing] more than $500 million." *Leckie* Petition at 3. *Amici's* carefully couched claim (borrowed from the Commissioner) that there are "thousands" of beneficiaries assigned as successors in interest to defunct signatory operators and "many" entities desiring to test SSA's successor

liability position stands in marked contrast. *See Amici* Brief at 9-10. Seven years into the statutory scheme, there is a dearth of pipeline litigants, *see* Respondents' Opp. at 16 -17, and in any event, the outcome of this issue is inconsequential to the beneficiaries, and neither jeopardizes the UMWA retirees' ability to receive their benefits nor the Combined Fund's ability to be reimbursed for providing them. *See id.* at 14-16.

5. Equally misguided is *Amici*'s stock claim that judicial decisions which limit related person or successor liability provide operators with a "blueprint" to shed or evade Combined Fund liability.[4] Congress mandated that the Commissioner's one-time "related person" determinations (which include successor in interest determinations) be fixed on conduct and facts that occurred prior to July 20, 1992. *See* 26 U.S.C. § 9701(c)(2)(B)(related person determination date). Thus any liability-avoiding efforts of the type described by *Amici*, *see supra* n.4, would have to be engaged in by an entity that has *already* been assigned Coal Act liability by the Commissioner based on its *pre*-enactment transactions and corporate relationships. Any such *post*-enactment maneuvering, however, is subject to Coal Act provisions requiring any transferor to notify the Combined Fund of any such transaction and remain the guarantor of the benefits provided. 26 U.S.C. § 9706(b)(2). Moreover, the Coal Act specifically prohibits the course of action *Amici* claims the decision below encourages, and provides *Amici* with the enforcement tools necessary to combat *post*-enactment sham

[4] *Compare Leckie* Petition at 3 ("The court of appeals' error is particularly significant because it establishes a blueprint for coal operators to use bankruptcy to avoid their Coal Act obligations."), *with Amici* Brief at 3 ("If the decision below stands, there is a serious possibility that companies liable under the Coal Act would seek to use the device of a successor firm to evade their statutory obligations . . . [which] could encourage assigned operators to try to terminate their Coal Act liability by changing the ownership of their working assets, distributing the proceeds to shareholders, and continuing their operations in a new corporate form.").



transactions. *See* 26 U.S.C. § 9722. ("If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability will be imposed) without regard to such transaction.").

6. Finally, *Amici* assert that Congress "did not want entities such as Jericol to receive the benefits of predecessor corporations, such as a trained and specialized work force, equipment in place, and uninterrupted operations, without shouldering the retiree health burdens of the previous entity." *Amici* Brief at 16. This ignores the fact that when Shackleford Coal sold assets to Jericol in *1973* and went out of business, Shackleford Coal had no "retiree health burden." As the Court noted in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), prior to the watershed *1974* coal wage agreement, companies had never promised lifetime health benefits to the UMWA retirees. In view of the fact that, if it existed today, Shackleford Coal could not constitutionally be required to pay premiums to the Combined Fund for its own union retirees, *Amici*'s assertion that the statute should be rewritten to require Jericol to pay for them seems strained.

The motion to file brief *Amici Curiae* should be denied, because the proffered brief offers nothing that would illuminate the Court's deliberation on the certworthiness of the Petition.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

| | | |
|---|---|---|
| **WALTER A. HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY,** | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | **Case No. 00-1307** |
| **SIGMON COAL COMPANY, INC. AND JERICOL MINING, INC.,** | ) | |
| **Respondents.** | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing **Respondents' Opposition To Motion Of The Trustees Of The UMWA Combined Benefit Fund For Leave To File Brief As *Amici Curiae* In Support Of Petitioner** to be served via first-class U.S. mail, postage prepaid, on the 2 day of April, 2001 to the following counsel:

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# In the Supreme Court of the United States

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WALTER A. HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

SIGMON COAL COMPANY, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

No. 00-1307

WALTER A. HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

SIGMON COAL COMPANY, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute that the Fourth Circuit's decision in this case—holding that the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, does not grant the Commissioner of Social Security the authority to assign liability for a retired miner's health benefits to the direct successor of the signatory operator that actually employed the miner (Pet. App. 26a)—conflicts directly with the decision of the D.C. Circuit in *R.G. Johnson Co.* v. *Apfel*, 172 F.3d 890 (1999), and that of the Third Circuit in *Aloe Energy Corp.* v. *Apfel*, No. 99-3915 (June 20, 2000), petition for cert. pending, No. 00-725. Rather, respondents argue that (1) the decision of the court of appeals is correct; (2) the Coal Act was the product of delicate legislative compromise that should not be

altered by a broad reading of its terms; and (3) the issue is not significant enough to warrant this Court's review. Each submission is without merit.

1. Respondents argue (Br. in Opp. 6) that the court of appeals correctly ruled that a direct successor of a signatory operator that employed a retired miner who is a beneficiary of the UMWA Combined Benefit Fund (Combined Fund) may not be held responsible for that miner's health-care benefits, even though a more distantly related direct successor of a related corporation within the same control group as a signatory operator may be held so responsible. Respondents fail to explain, however, why Congress would have wanted the Coal Act to be read to accomplish such a strange outcome. It was precisely the strangeness of that reading of the Coal Act's related-person definition in 26 U.S.C. 9701(c)(2) that led the D.C. Circuit in *R.G. Johnson* to conclude that the statute should be more sensibly construed to permit the imposition of liability on direct successors to signatory operators. See *R.G. Johnson*, 172 F.3d at 85.[1]

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[1] Although the D.C. Circuit concluded that the plain language of the Coal Act does not support such direct-successor responsibility for financing health-care benefits, see *R.G. Johnson*, 172 F.3d at 894, it also concluded that Section 9701(c)(2)(A) presented the unusual case in which the plain language of the statute is not a reliable indicator of Congress's intent, see *id.* at 895. The Third Circuit in *Aloe* adopted the same reasoning. See 00-725 Pet. App. 7a-8a (*Aloe Energy Corp.* v. *Halter*, *supra*) (reprinting court of appeals' decision in *Aloe*). In our view, the plain language of the Coal Act does support (or at least does not preclude) direct-successor liability. First, Section 9701(c)(2)(A) states that a person shall be considered to be a "related person to a signatory operator" (and therefore potentially responsible for the benefits of persons employed by that signatory operator) if it is a "related person" to, among other entities, a member of the controlled group of corporations that includes the signatory operator. But since a signatory operator is a member of the control group that includes itself, its own direct successor is a related person to it, under the Coal Act's definition of "related person." Second, while Section 9701(c)(2)(A) provides that certain entities "shall be considered to be a related person," it does not provide that all other entities shall *not* be considered to be so related, and thus does not preclude the Commissioner from looking to general principles of direct successorship in the law to assign responsibility for a signatory operator's beneficiaries to its direct successor. We do agree with the D.C. Circuit and the Third Circuit, however, that broader principles of effectuating legislative intent support direct-successor responsibility as well. Cf. *Johnson* v. *United States*, 120 S. Ct. 1795, 1804 n.9 (2000) (reiterating that "statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion").



Respondents suggest (Br. in Opp. 6 n.5) that Congress might have precluded direct-successor liability because it wanted to promote the buying and selling of companies free of Coal Act liabilities. Respondents point to nothing in the text or legislative history to suggest that this was one of Congress's objectives in enacting the Coal Act, however, and the suggestion is implausible. As *amicus curiae* Combined Fund points out (Br. 7), the shifting of corporate forms to avoid liability for miners' health-care benefits was one of the very practices that caused the crisis in financing of the predecessor UMWA Benefit Trusts and led Congress to intervene by passage of the Coal Act. Simply by selling its business to a new corporate entity, a signatory operator would be able to foist responsibility for its own employees' benefits on the government and, potentially, other signatory operators. See pp. 5-7, *infra*. As Judge Murnaghan observed in dissent below, there is no reason to conclude "that Congress intended

to promote the exact practice that necessitated legislative action in the first place." Pet. App. 42a.[2]

2. Respondents further argue (Br. in Opp. 8-13) that the Coal Act is the product of a delicate legislative compromise after a contentious lawmaking process and so the Court should be reluctant to read broadly its terms imposing financial responsibility. It is true that the process of framing the Coal Act was difficult, as Congress sought to balance various interests and choose among divergent proposals for a remedy to the crisis in funding miners' health-care benefits. Nothing in the legislative record suggests, however, that there was any significant disagreement in Congress about the particular issue in this case, *viz.*, financial responsibility of direct successors to signatory operators. Senator Rockefeller, the principal sponsor of the Coal Act, explained on the floor of the Senate that the Coal Act's provision for responsibility of related persons included responsibility for direct successors to signatory operators, see 138 Cong. Rec. 34,033 (1992), and no one contradicted his statement. Similarly, no one contradicted the explanation inserted into the record by Senator Wallop that, "because of complex corporate structures which are often found in the coal industry, the number of entities made jointly and severally liable for a

[2] Indeed, it is difficult to understand how the Coal Act could have promoted such an objective in any event. The Act can have no impact on sales that occurred before its operative date, because those transactions were negotiated and completed before the imposition of statutory liability. As for post-enactment transactions, Congress has expressly dealt with the disincentives posed by Coal Act liabilities in provisions empowering companies to transfer those liabilities by contract, provided that the selling company remains the guarantor of premium payments. See 26 U.S.C. 9711(g)(2).



signatory operator's obligations under the definition of related persons is intentionally very broad." *Id.* at 34,002.[3]

3. Finally, respondents argue (Br. in Opp. 14) that the issue of successor liability is not significant enough to warrant certiorari because the issue concerns only which among several private entities will be responsible for a miner's health-care benefits. As a factual matter, that submission is incorrect. As respondents note (*id.* at 15 n.12), in the case of a beneficiary of the Combined Fund who is deemed "unassigned" because no former employer or related person liable under the statutory definition could be identified, health-care benefits are financed at the outset by government funds (if such funds are available) transferred from interest earned on the Department of the Interior's Abandoned

[3] Respondents note (Br. in Opp. 12-13) that Representative Rostenkowski remarked on the floor of the House of Representatives that the House's conferees were uneasy with various provisions in the Coal Act, including "numerous inequities among the companies that will be required to pay for these benefits," but had acquiesced in those perceived inequities in order to secure passage of the comprehensive energy policy legislation before Congress. Representative Rostenkowski identified specific concerns about various provisions in the Coal Act, including provisions that imposed responsibility for miners' benefits on companies that, he believed, had either discharged their obligation for those miners' benefits (such as companies that had paid withdrawal liability to the old UMWA Benefit Trusts) or had only a tenuous connection to the miners (such as companies that only leased property to a mining operator). See 138 Cong. Rec. 32,080 (1992). Representative Rostenkowski nowhere indicated, however, that the Coal Act's approach to direct-successor liability was one of the "inequities" that he perceived.

Mine Reclamation (AMR) Fund.[4] Thus, the effect of the court of appeals' decision is to foist the cost of financing the health-care benefits of retired miners and their dependents on to the public fisc. That result is contrary to Congress's intent that the Combined Fund be established as a private entity with funding from private sources. See Pet. 4; Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142, 106 Stat. 3037.

Second, as *amicus curiae* Combined Fund points out (Br. 9), if AMR funds are unavailable or exhausted, then responsibility for unassigned beneficiaries is placed on all signatory operators (or their related persons) in a *pro rata* fashion. The court of appeals' decision thus has the potential to recreate the very conditions that led to the Coal Act's enactment—responsibility for "orphaned" retirees (whose employers had dissolved or left the coal industry) being forced on a dwindling number of coal companies that had chosen not to avoid their responsibilities to their own employees and had remained in the coal business. If that process continues, the situation could ultimately impair the financial stability of the Combined Fund. And while the Social Security Administration (SSA) has not been able to obtain a precise count of the number of assignments that will be affected by the decision below (see Pet. 14 n.4; Br. in Opp. 16), SSA believes that that number is substantial, perhaps in the thousands. That potential impact is sufficient to warrant this Court's resolution of the conflict in the

[4] Transfers from interest on the AMR Fund to the Combined Fund are authorized only for fiscal years beginning on or after October 1, 1995. Before that date, the benefits of unassigned beneficiaries were paid in the first instance out of funds transferred from the predecessor UMWA Benefit Trusts, not the AMR Fund. See 26 U.S.C. 9705(a)(3); 30 U.S.C. 1232(h)(1).



circuits on the issue of responsibility for Coal Act benefits of a direct successor to a signatory operator.[5]

* * * * *

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *Aloe Energy Corp.* v. *Apfel*, No. 00-725, and then disposed of as appropriate in light of the disposition of that case.

Respectfully submitted.

BARBARA D. UNDERWOOD
*Acting Solicitor General*

APRIL 2001

[5] As we stated in the petition (at 15), we do not oppose the private party's request for this Court's review in *Aloe Energy Corp.* v. *Halter*, No. 00-725, which was filed before our petition in this case and which raises the same issue. The Court should therefore hold this petition pending its disposition of *Aloe*.

MOTION FILED
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No. 00-1307

# In the Supreme Court of the United States

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY,
*Petitioner*,

v.

SIGMON COAL COMPANY, INC. AND JERICOL MINING, INC.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## MOTION OF THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## MOTION OF THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Trustees of the United Mine Workers of America Combined Benefit Fund ("Combined Fund"), pursuant to Rule 37.2(b) of the Rules of this Court, respectfully move for leave to file the accompanying brief as *amici curiae* in this case in support of petitioner. The Trustees participated below as *amici* before both the court of appeals and the district court. In addition, the court of appeals granted the Trustees' motion to participate in the oral argument before that court. Counsel for the petitioner Commissioner of Social Security, and respondents Jericol Mining, Inc. ("Jericol") and Sigmon Coal Company ("Sigmon"), have been informed of this Motion. The Commissioner has consented to the filing of the Trustees' brief, and respondents have withheld such consent, thus necessitating the filing of this motion. For the reasons set forth below, the

Trustees respectfully request that their motion be granted and that the Court permit the filing of the accompanying brief in support of petitioner.

## INTEREST OF THE *AMICI CURIAE*

This case involves the proper interpretation of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"). Congress enacted the Coal Act to remedy a longstanding funding crisis in the collectively bargained multiemployer benefit plans that provided health coverage for the nation's coal industry retirees. *See Eastern Enterprises v. Apfel,* 524 U.S. 498, 504-15 (1998) (plurality opinion) (reviewing historical and legislative background of the Coal Act). The Combined Fund was created pursuant to Section 9702 of the Coal Act. 29 U.S.C. § 9702. The two pre-existing collectively bargained UMWA benefit plans were merged into the Combined Fund in accordance with the statute. 26 U.S.C. § 9702(a)(1), (2). The Combined Fund is an employee welfare benefit plan and a multiemployer plan within the meaning of Sections 3(1) and (37) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1), (37). Now in its ninth fiscal year of operation under the Coal Act, the Combined Fund has extensive experience with the statute and with the coal industry. *See, e.g., Eastern Enterprises,* 524 U.S. at 504-15, 519 n.4 (plurality opinion) (citing cases). As a consequence, the Trustees of the Combined Fund are familiar with the issues in this case and their potential impact on the administration of the benefit program mandated by the Coal Act.

Under the Coal Act, the Social Security Administration ("SSA") is responsible for assigning individual Combined Fund beneficiaries to specific former employers pursuant to a three-tiered set of priorities set forth in Section 9706 of the statute. 26 U.S.C. § 9706. The employers receiving such assignments ("assigned operators") are then responsible for the payment of statutory premiums to finance the provision of health care benefits to their assigned beneficiaries. 26 U.S.C. § 9704. The Coal Act's scheme of liability contains broadly worded provisions that extend responsibility for Combined Fund beneficiaries to a wide range of entities, including current and former signatory operators, related persons to signatory operators, and successors. 26 U.S.C. §§ 9701(c)(1), 9711, 9712(d).

The issue in this case is whether the Coal Act permits SSA to assign Combined Fund beneficiaries to the "successor in interest" of an out-of-business "signatory operator," as those terms are defined in the Coal Act. As the entity charged by Congress with the responsibility to collect health care premiums from assigned operators and to provide health coverage to the Combined Fund's beneficiaries, that issue is of substantial and immediate concern to the Combined Fund. Since February 1993, the Combined Fund has provided benefits for all of the beneficiaries assigned to respondent Jericol, despite the fact that Jericol and its related person, respondent Sigmon, have failed in significant part to pay for those benefits.* The decision of the panel majority in the court below has prevented the Combined Fund from collecting the balance of the premiums owed by respondents, and, if permitted to stand, will create inconsistency in the Combined Fund's application of the Coal Act.

The Combined Fund has been directly involved in addressing the issue of whether SSA may assign beneficiaries to the successor in interest of a signatory operator. In addition to their participation as *amici curiae* in the briefing and oral argument before the Fourth Circuit in this case, the Trustees of the Combined Fund were parties in *R.G. Johnson Co., Inc. v. Apfel,* 172 F.3d 890 (D.C. Cir. 1999). In that case, the D.C. Circuit held that the Coal Act permits SSA to assign beneficiaries to the successor in interest of a signatory operator —a ruling directly at

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* SSA assigned certain Combined Fund beneficiaries to Jericol as a direct successor in interest to a defunct signatory operator, Shackleford Coal Company. Pet. App. 11a.

odds with the decision for which the Commissioner now seeks review. Moreover, the Trustees of the Combined Fund participated as *amici curiae* before the district court in *Aloe Energy Corp. v. Apfel*, No. 98-1371 (W.D.Pa. Oct. 12, 1999), *aff'd*, No. 99-3915 (3d Cir. June 20, 2000), *cert. pending*, No. 00-725 (docketed Nov. 7, 2000). The Third Circuit's ruling in *Aloe* is consistent with the reasoning and holding of the D.C. Circuit in *R.G. Johnson* and conflicts with the Fourth Circuit's ruling here..

As fiduciaries for the Combined Fund's beneficiaries, the Trustees have a substantial interest in the proper resolution of this conflict among the circuits. The Combined Fund is charged with providing vital health care benefits to thousands of coal industry retirees and their dependents throughout the country. To assure the continuation of these benefits, the Combined Fund seeks to maintain a funding base of contributing employers that is as broad as possible. If the decision below is unreviewed, there will be a clear and irreconcilable schism among the courts of appeals that surely will foster additional litigation by assigned operators seeking to rid themselves of their statutory obligations. It is the creation of this uncertainty and the opportunity for inconsistency in the application of the employer liability provisions of the Coal Act that would seriously and adversely affect the interests of the Combined Fund and its thousands of beneficiaries throughout the country.

## CONCLUSION

The Trustees' motion should be granted, and the Court should permit the filing of the accompanying brief of the Trustees as *amici curiae* in support of petitioner.

Respectfully submitted,

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March 20, 2001

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**BRIEF OF THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

## INTEREST OF THE *AMICI CURIAE*

The UMWA Combined Benefit Fund ("Combined Fund") is a statutory health care trust created by Congress under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq*. (the "Coal Act").[1] The Coal Act was passed to remedy a crisis in the funding of the preexisting collectively bargained multiemployer health benefit plans in the coal industry, a crisis that threatened to deprive retired miners and their dependents of promised health benefits. Under Section 9702 of the Coal Act, the preexisting UMWA benefit plans were merged into the newly created Combined Fund, and the Combined Fund began

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the Combined Fund, its Trustees, or its counsel, has made a monetary contribution to its preparation or submission..

providing health coverage as of February 1, 1993. The Trustees of the Combined Fund, chosen in accordance with Section 9702 of the statute, are charged with the responsibility for administering the Combined Fund, collecting health care premiums from assigned operators, and providing health coverage to the Combined Fund's beneficiaries.[2]

The issue in this case is whether the Coal Act permits the Social Security Administration ("SSA") to assign Combined Fund beneficiaries to the "successor in interest" of an out-of-business "signatory operator," as those terms are defined in the Coal Act. Pet. I. As the fiduciaries responsible for the health care of the Combined Fund's beneficiaries, the Trustees have a substantial and immediate concern with the resolution of that issue. Since February 1993, the Combined Fund has provided benefits for all of the beneficiaries assigned to respondent Jericol Mining, Inc. ("Jericol"), despite the fact that Jericol and its related person, respondent Sigmon Coal Company ("Sigmon"), have failed in significant part to pay for those benefits.[3] The decision of the panel majority in the court below has prevented the Combined Fund from collecting the balance of the premiums owed by respondents, and, if permitted to stand, will create inconsistency in the Combined Fund's application of the Coal Act.

The Trustees have a substantial interest in the proper resolution of the conflict in the circuits created by the court of appeals' divided decision in this case. The Combined Fund seeks to ensure that the base of contributing employers remains as broad as possible, so as to prevent an ever-increasing burden from falling on an ever-declining group of employers, which, in

[2] The Trustees of the Combined Fund are William P. Hobgood, Michael H. Holland, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. Van Horn, and Gail R. Wilensky.

[3] SSA assigned certain Combined Fund beneficiaries to Jericol as a direct successor in interest to a defunct signatory operator, Shackleford Coal Company ("Shackleford"). Pet. App. 11a.



turn, could lead to a repeat of the crisis that Congress sought to resolve when it enacted the Coal Act in the first place. If the decision below stands, there is a serious possibility that companies liable under the Coal Act would seek to use the device of a successor firm to evade their statutory obligations. The court of appeals' decision could encourage assigned operators to try to terminate their Coal Act liability by changing the ownership of their working assets, distributing the proceeds to shareholders, and continuing their operations in a new corporate form. If this were to occur, the health benefits for the affected beneficiaries would be financed by an ever-shrinking group of responsible companies with no relationship to the beneficiaries. This would go a long way toward re-creating the very sort of dwindling funding base that Congress sought to rectify through the Coal Act.

The Trustees accordingly have a strong interest in supporting the position of petitioner in this case.

## SUMMARY OF ARGUMENT

This case presents significant issues that warrant review by this Court.

First, the Fourth Circuit's decision creates a split among the federal appellate courts, for it is in direct and acknowledged conflict with the holdings of the two other appellate courts that have addressed the issue of whether the Coal Act permits SSA to assign Combined Fund beneficiaries to the successor in interest of a signatory operator. In contrast to the panel majority's decision, the D.C. Circuit in *R.G. Johnson Co., Inc. v. Apfel*, 172 F.3d 890 (D.C. Cir. 1999), and the Third Circuit in *Aloe Energy Corp. v. Apfel*, No. 99-3915 (3d Cir. June 20, 2000), *cert. pending*, No. 00-725 (docketed Nov. 7, 2000), sustained SSA's assignment of Combined Fund beneficiaries to a direct successor of a signatory operator.

Second, this Court should grant review because the decision below, although binding precedent only in the federal courts of

the Fourth Circuit, has a far larger practical impact. Given the numerous Combined Fund beneficiaries and coal companies that can be found within that circuit, many entities seeking to challenge SSA's position on successor in interest liability are likely to be able to satisfy applicable venue requirements within the Fourth Circuit. The panel's decision is likely to have a disproportionate significance, despite the fact that two other circuits already have resolved the issue the other way. This very real practical consideration militates strongly in favor of review now, before the conflict in the circuits greatly jeopardizes the provision of Combined Fund benefits to the beneficiaries whom the Coal Act is intended to protect.

Third, review is warranted because the court of appeals misapplied this Court's well-established rules governing statutory construction. Given the potential ambiguity in the statute, the panel should have deferred to the reasonable statutory interpretation of SSA, the agency entrusted to administer the assignment of beneficiaries under the Coal Act. *See Chevron v. NRDC*, 467 U.S. 837, 842-45 (1984). Moreover, the interpretation of the Coal Act by the panel majority is inconsistent with the principle that the meaning of statutory language should be determined in the context of, and with reference to, the statutory scheme of which it is a part. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). The following factors all tend to demonstrate that this is not a case in which an inescapable plain meaning of the statutory language somehow runs counter to the underlying statutory purpose:

- Nowhere in the Coal Act does Congress say—as it surely could have if it wished to—that SSA may *not* assign Combined Fund beneficiaries to successors in interest to signatory operators;
- As SSA has explained, Section 9701(c)(1)'s description of "related persons" is written in *inclusive* terms of the sort that courts have construed expansively;



- With respect to the two principal components of the Coal Act other than the Combined Fund—the individual employer plans and the 1992 Benefit Plan—Congress explicitly provided (in Section 9711(g)(1) of the statute) that successors in interest of signatory operators are just as liable as the signatory operators themselves;
- Senator Rockefeller, the chief sponsor of the Coal Act, expressly stated that the term "signatory operator" in Section 9701(c)(1) includes a successor in interest of such an operator, and no one in Congress challenged that assertion;
- Before any litigation on the subject, SSA, the agency charged with the statutory task of assigning Combined Fund beneficiaries under 26 U.S.C. § 9706(a), determined that assignments could be made to successors in interest to signatory operators;
- Even if one were to follow a rigid plain meaning approach, the explicit general rules of statutory construction set forth in 1 U.S.C. §§ 1-6 directly support the view that the statutory term "signatory operators" should be construed to include successors in interest to such operators; and
- SSA's construction is consistent with Congress' purpose in enacting the Coal Act and avoids the illogical consequences that follow from the panel majority's approach.

Finally, the Court should grant review because the holding of the panel majority is inconsistent with the reasoning of several federal appellate courts, including the Fourth Circuit, when presented with a similar question of statutory construction in the context of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* (1980) ("CERCLA"), another federal statute with a wide-ranging remedial purpose. CERCLA also does not expressly address successor liability. Nevertheless, every federal court of appeals that has considered the question has decided that Congress intended successor corporations to be held liable

under the statute. For all these reasons, this Court should grant review and decide the question presented in this case.[4]

## ARGUMENT

### I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS

The decision below directly conflicts with the D.C. Circuit's decision in *R.G. Johnson* and the Third Circuit's decision in *Aloe*. The latter courts decided that invalidating SSA's assignment of Combined Fund beneficiaries to successors in interest of signatory operators would frustrate Congress' stated intent "to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." *R.G. Johnson*, 172 F.3d at 895 (*citing* Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037 (codified at note following 26 U.S.C. § 9701 (1994))); *Aloe* (00-725 Pet. App. 8a). Moreover, these courts held that the Coal Act should be construed to permit assignments to direct successors in interest to avoid the implausible result that Congress authorized liability for successors to related persons but not for successors to signatory operators themselves. *Id.*

The Fourth Circuit wrongly declined to follow the reasoning of the D.C. Circuit and the Third Circuit. In rejecting the holding of those courts, the panel majority stated that "[w]e are not persuaded that there is no logic to shielding successors in interest to signatory operators from liability but not successors in interest to 'related persons.'" Pet. App. 32a. The panel suggested that Congress may have intended to exclude successors in interest from Combined Fund liability to "foster

[4] The Commissioner has suggested that the Court grant review of the earlier-filed petition in *Aloe*, No. 00-725, and hold the petition in this case pending the disposition of *Aloe*. Pet. 15. The Trustees support that suggested course, but they urge that, in the event the petition in *Aloe* is not granted, the petition in this case should be, so that the underlying legal issue can be resolved promptly.



the sale or transfer of coal companies." Pet. App. 34a. This conclusion is unsupported and unsupportable. As the late Judge Murnaghan stated in dissent, the majority's theory "presumes that Congress intended to promote the exact practice that necessitated legislative action in the first place." Pet. App. 42a; *see also R.G. Johnson*, 172 F.3d at 895 ("Nor are we impressed by our dissenting colleague's suggestion . . . that Congress could have intended to benefit coal miners by eliminating the impediment to the sale of a coal company posed by the potential liabilities created by the Coal Act."). Indeed, the purpose of the Coal Act will be undermined by the majority's decision, because health care costs for the Shackleford retirees will likely be borne by assigned operators with no connection to these retirees, while Jericol, the existing entity with a direct connection to the beneficiaries, will be absolved of all liability.

The majority ignores the fact that related persons to signatory operators are frequently coal operators themselves. The majority offers no explanation for why Congress would have been concerned with encouraging the sale of coal companies to successors in interest of signatory operators, but not with encouraging such sales to successors in interest of related persons. Likewise, the majority offers no explanation for why Congress would have included successors of signatory operators in Section 9711(g)(1) of the Coal Act, which applies to the UMWA 1992 Benefit Plan and individual employer plans, but excluded successors of signatory operators from SSA's assignment of Combined Fund beneficiaries. *See* Pet. App. 31a. If Congress intended to exclude successors in interest from Coal Act liability to encourage the sale of coal companies, why would it not have excluded successors in interest from liability to individual employer plans and the 1992 Plan as well?

Contrary to the majority's reasoning, the result below is not just "somewhat anomalous," Pet. App. 34a; it is an incongruous outcome that cannot be reconciled with the intent of Congress. It was precisely for this reason that the D.C. Circuit held that the

Coal Act authorizes SSA in appropriate circumstances to assign Combined Fund beneficiaries to successors to signatory operators. *R.G. Johnson*, 172 F.3d at 895. As the court of appeals there explained,

> In light of . . . the broad reach of the provisions imposing liability on related persons, we can think of no reason why Congress would have intended to impose liability for the beneficiaries on, for example, a successor in interest to a Coca-Cola bottling company under common control with a signatory coal mine operator while exempting a coal-mining successor in interest to that operator.

*Id.*; *see also Aloe*, 00-725 Pet. App. 8a. The panel majority's decision in this case fails to provide any reasonable explanation for why Congress allegedly intended such an odd outcome.

## II. REVIEW SHOULD BE GRANTED TO PROTECT THE STABILITY OF THE COAL ACT

The opinion of the panel majority is also flawed because it completely ignores the potentially devastating consequences of its holding. The construction advocated by Jericol would create a serious possibility that companies liable under the Coal Act would seek to use the device of a successor firm to evade their statutory obligations. If the majority's decision stands, it will encourage assigned operators to try to terminate their Coal Act liability by changing the ownership of their working assets, distributing the proceeds to shareholders, and continuing their operations in a new corporate form. As Judge Murnaghan aptly stated, "excluding successors in interest from liability for retiree benefits does more than *promote* the sale of coal companies; it *actively encourages* the sale of coal companies." Pet. App. 42a (emphasis in original).

If the decision below is left undisturbed, health benefits for the affected beneficiaries would be financed by an ever-shrinking group of responsible companies with no relationship to the beneficiaries. If the assignments to Jericol are vacated, SSA will need to treat the beneficiaries as unassigned, except in



the unlikely event that SSA is able to identify another responsible operator to whom the beneficiaries could be assigned. *See* Pet. 14. The amount of funds available for transfer from the Abandoned Mine Reclamation Fund—a fund established under the Surface Mining Control and Reclamation Act of 1977—to pay for health benefits for unassigned miners is not unlimited, and in any event such funds are not available for the Combined Fund's first three plan years. *See* 30 U.S.C. §§ 1232 (h)(2) and (3)(B); 26 U.S.C. § 9705. When the monies from that Fund are exhausted or unavailable, the cost of providing benefits to the unassigned miners will be assessed against other operators to which beneficiaries have been assigned under the Act. *See* 26 U.S.C. § 9704(a)(3), (d).

This will have the effect of undermining the Coal Act's purpose, because financial responsibility for the Shackleford retirees' benefits will not be placed on Jericol, the existing entity with a direct connection to the beneficiaries. This would go a long way toward re-creating the very sort of dwindling funding base that Congress sought to rectify through the Coal Act. *See Holland v. Keenan Trucking Co.*, 102 F.3d 736, 738-39 (4th Cir. 1996)(discussing the "financial distress" of the UMWA Plans that led to the enactment of the Coal Act); Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission") at p. 2 (stating that the UMWA Plans, "which were created to provide retired coal miners and their families with one of the finest health care programs in the nation" were in "financial crisis").[5] As the dissent observed, "[t]he majority's theory thus suggests that Congress intended to cure the crisis in the coal industry by infecting it with part of the disease." Pet. App. 43a.

Moreover, the circuit conflict created by the decision below may lead to serious inequities in the administration of the Coal Act. SSA has indicated in its Petition that it has assigned

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[5] The Coal Commission Report was filed as an attachment to the Trustees' brief as *amici curiae* in the court of appeals.

thousands of Combined Fund beneficiaries on the grounds that the assigned operators are successors in interests to out-of-business signatory operators. Pet. 14 n.4. Given the numerous Combined Fund beneficiaries and coal companies that can be found within the Fourth Circuit, many entities seeking to challenge SSA's position on successor liability are likely to be able to satisfy applicable venue requirements within that circuit. The Combined Fund and SSA are likely to find themselves faced with new legal challenges within the Fourth Circuit and other jurisdictions, resulting in great uncertainty in the administration of the statute. Likewise, Congress' intent to create an equitable allocation of financial responsibility among a broad range of entities is undermined by the panel's decision. Congress could not have intended for a Pennsylvania company, for example, to pay Combined Fund premiums based on successor liability, while at the same time shielding from liability an identically-situated Virginia company. The question presented therefore merits consideration by this Court.

## III. THE FOURTH CIRCUIT'S OPINION MISCONSTRUES THE STATUTORY LANGUAGE, LEGISLATIVE HISTORY, AND PURPOSE OF THE COAL ACT, AS WELL AS THE HOLDINGS OF THIS COURT.

The panel majority erred in holding that the Coal Act text unambiguously excludes a successor in interest to a signatory operator from the definition of "related person" in Section 9701(c)(2)(A).[6] There are two ways in which the statutory

[6] The statutory definition of "related person" provides as follows:

> (A) In general.—A person shall be considered to be a related person to a signatory operator if that person is—
>
> > (i) a member of the controlled group of corporations (within the meaning of section 52(a)[of the Internal Revenue Code]) which includes such signatory operator;



language can be read to include signatory operators themselves and thus successors in interest to signatory operators as well. First, the signatory operators themselves are among the persons described in clauses (i), (ii), and (iii) of Section 9701(c)(1), each of which explicitly refers to signatory operators. Thus, when the statute refers to "a successor in interest of any person described" in clauses (i), (ii), and (iii), it includes successors to assigned operators themselves. Second, a signatory operator itself is, by definition, "a member of the controlled group of corporations . . . which includes such signatory operator," just as a father or mother is, by definition, a member of the family of which he or she is a part. Either way, if the signatory operator is considered "related" to itself, or if it is considered a "person described" in one or more of the explicitly enumerated categories of "related persons," a successor to the signatory operator would qualify as a "related person" under the statutory definition. At a minimum, nothing in the Coal Act expressly *prohibits* the assignment of Combined Fund beneficiaries to successors in interest of signatory operators, and Congress surely would have said so explicitly if it had intended to take such a peculiar step.

Although Congress could have expressed its intention more clearly in Section 9701(c)(1), SSA's interpretation is a plausible reading of the statutory language, and it is fully consistent with the congressional objectives of preserving a broad funding base for the Combined Fund and identifying assigned operators for as

> (ii) a trade or business which is under common control (as determined under section 52(b) [of the Internal Revenue Code]) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries . . . .
>
> A related person *shall also include a successor in interest of any person described* in clause (i), (ii), or (iii).

26 U.S.C. § 9701(c)(2)(A)(emphasis added).

many Combined Fund beneficiaries as possible. Moreover, SSA's construction avoids the illogical consequences that follow from the panel majority's more restrictive approach. It is undisputed that the Coal Act authorizes assignments of beneficiaries to successors in interest to related persons to signatory operators. As the D.C. Circuit held, it is inconceivable that Congress would have decided to authorize liability for successors to related persons but not for successors to signatory operators themselves. *R.G. Johnson*, 172 F.3d at 895. Similarly it is undisputed that, where individual employer plans and the 1992 Benefit Plan are concerned, the Coal Act explicitly makes successors in interest of signatory operators liable to the same extent as the signatory operators themselves. 26 U.S.C. § 9711(g)(1). There is no logical reason why Congress would have wanted to adopt that approach with respect to individual employer plans and the 1992 Plan but not with respect to the Combined Fund. Nor is there the slightest hint anywhere in the legislative materials leading to the Coal Act that Congress had any such intent.

Moreover, even apart from the definition of "related persons," the Coal Act's references to "signatory operators," under the general rules of statutory construction applicable to all federal statutes, should be construed to include successors to such signatory operators. *See* 1 U.S.C. §§ 1-6. Section 9701(c)(1) defines a "signatory operator" as "a person which is or was a signatory to a coal wage agreement." Congress, however, did not define "person" in the Coal Act. Title 1 of the U.S. Code provides that the word "person" includes "corporations, companies, associations, firms, partnerships . . . as well as individuals." Section 5 of Title 1 states that "the word 'company' or 'association,' when used in reference to a corporation, shall be deemed to embrace the words, 'successors and assigns of such company or association,' in like manner as if these last-named words, or words of similar import, were expressed."



Thus, when the term "signatory operator" is read—using the general provisions of the U.S. Code as a key to Congress' intended meaning—it becomes clear that "signatory operator" is a person, which includes a company or association, as well as any successors and assigns of such company or association. Application of these statutory rules of construction to this case supports the conclusion that Congress intended the Coal Act to apply to direct successors of signatory operators.[7]

Given the potential ambiguity in the statute, the panel should have deferred to the reasonable statutory interpretation of SSA. That interpretation was established prior to any litigation on the issue. *See* Pet. 7-8, Pet. App. 83a-94a (Supp. Coal Act Review Instructions #4, July 1995). As the agency entrusted to administer the assignment of beneficiaries under the Coal Act, SSA's reasonable interpretation of the statute is entitled to substantial deference. *See Chevron*, 467 U.S. at 842-45; *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1251-52 (D.C. Cir. 1998)(holding that SSA's interpretation of the term "coal industry," as it is used in the Coal Act, is reasonable and should be upheld); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688, 691-93 (3d Cir. 1996)(according deference to SSA's internal guidelines defining the Coal Act term "in business."). A court may set aside SSA's assignments to Jericol only if such actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See* 5 U.S.C. § 706(2)(A); *Aloe*, 00-725 Pet. App. 7a-8a (holding that SSA's assignment to the successor of a signatory operator "was neither arbitrary or capricious.").

---

[7] There is no question that these general rules of statutory construction are an appropriate tool for the Court to use when deciding the plain meaning of "signatory operator" as used in the Coal Act. Title 1 of the U.S. Code provides that the general rules of construction apply in determining "the meaning of any Act of Congress, unless the context indicates otherwise." As previously explained, the Coal Act was enacted as a broad remedial statute, and the context therefore is fully in accord with the outcome indicated by the general rules of statutory construction.

Moreover, even if, contrary to everything we have said, the Court were to conclude that the statutory language is clear, it still would not follow inevitably that SSA should be prohibited from assigning Combined Fund beneficiaries to successors to signatory operators. Courts may look beyond the plain language of even unambiguous statutes where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters," *R.G. Johnson*, 172 F.3d at 895 (citing *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)), or would lead to an absurd result, *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930). It was on this basis that the D.C. Circuit in *R.G. Johnson* and the Third Circuit in *Aloe* upheld SSA's assignment of Combined Fund beneficiaries to the successor in interest of a signatory operator.

As the D.C. Circuit recognized, the legislative history and the text of the Coal Act demonstrate that Congress intended that direct successors to signatory operators should be liable for Combined Fund premiums. 172 F.3d at 895. In enacting the Coal Act, Congress recognized that a major cause of the funding crisis afflicting the existing collectively bargained multi-employer plans was signatory operators going out of business or transferring operations to a new entity, and leaving their former employees behind to obtain benefits financed by other employers. To ensure an equitable allocation of financial responsibility and a stable source of funds for health benefits, Congress imposed Coal Act liabilities on a broad range of entities. *See* Sections 9701(c), 9706(a), 9711(c),(g), 9712(d). In particular, Congress provided that all "related persons" of a signatory operator would be jointly and severally liable for the operator's Coal Act obligations, and Congress defined "related persons" broadly to find a specific obligor for as many beneficiaries as possible. *See* 138 Cong. Rec. 34002 (1992) ("[B]ecause of complex corporate structures which are often found in the coal industry, the number of entities made jointly and severally liable for a signatory operator's obligations under the definition of related person is intentionally very broad. In



this regard, the term 'related person' is defined broadly to include companies related to the signatory operator."); *id.* at 34001 ("definitions are intended by the drafters to be given a broad interpretation"). Excluding successors from this broad group of related persons would contravene congressional intent.

Senator Rockefeller, the principal sponsor of the Coal Act, confirmed the correctness of SSA's view in floor remarks shortly before the Senate's vote on the statute. In the course of clarifying a number of technical points, Senator Rockefeller stated that "[t]he term 'signatory operator,' as defined in new section 9701(c)(1), includes a successor in interest of such operator." 138 Cong. Rec. 34033 (1992) (statement of Sen. Rockefeller). As the principal sponsor of the legislation, Senator Rockefeller's unchallenged remarks are entitled to special weight. *See, e.g., North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982)(remarks by the sponsor of legislation "are an authoritative guide to the statute's construction"); *Simpson v. United States*, 435 U.S. 6, 13-15 (1978)(same).

The broad purpose and overall statutory scheme of the Coal Act strongly supports Senator Rockefeller's view. The construction of the Coal Act by the panel majority is inconsistent with this Court's well-established principle that the meaning of statutory language should be determined in the context of, and with reference to, the statutory scheme of which it is a part. *See Brown & Williamson*, 529 U.S. at 132-33 ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'")(citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). Moreover, this Court has cautioned that "the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Public Citizen v. U.S. Dep't. of Justice*, 491 U.S. 440, 455 (1989)(citing *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.)). The Congress that enacted the

Coal Act to protect retiree health benefits, to assign as many Combined Fund beneficiaries as possible to specific operators, and to preserve a broad funding base for retiree health care did not want entities such as Jericol to receive the benefits of predecessor corporations, such as a trained and specialized work force, equipment in place, and uninterrupted operations, without shouldering the retiree health burdens of the previous entity.

## IV. THE FOURTH CIRCUIT'S OPINION RUNS COUNTER TO FEDERAL APPELLATE DECISIONS IMPOSING SUCCESSOR LIABILITY IN THE CONTEXT OF CERCLA

In a highly analogous context, several courts of appeals, including the Fourth Circuit, have relied on accepted rules of statutory construction and established concepts of corporate law to hold successors liable for hazardous waste cleanup costs imposed by CERCLA, even though CERCLA does not expressly provide for successor liability. *See United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). The reasoning of these courts, when applied to the question of successor liability under the Coal Act, provides additional support for SSA's assignments to Jericol.

The panel majority in this case wrongly dismissed the Fourth Circuit's holding in *Carolina Transformer* on the ground that that decision was based on language in CERCLA, which is "separate" and "unrelated" to the Coal Act. Pet. App. 35 n.7. In so holding, the panel ignored that the *Carolina Transformer* decision looked not only to the purpose of CERCLA as a remedial statute, but to "traditional and evolving principles of federal common law, which Congress has left to the courts to



supply interstitially." *Carolina Transformer*, 978 F.2d at 837-38.[8]

The considerations and concerns that allow successors to be held liable under CERCLA apply with greater force in the context of the Coal Act because successor liability is expressly included in the Coal Act. Here, as in CERCLA, Congress has enacted a broad, remedial statute. The underlying purpose of both statutes is to identify those entities most responsible for a problem Congress sought to rectify. Just as CERCLA permits a successor to be held liable because "Congress has emphasized funding by responsible parties," *Smith Land & Improvement Corp.*, 851 F.2d at 91, so too does the Coal Act permit assignment of Combined Fund liability to a successor to a signatory operator because Congress emphasized funding by the

---

[8] Congress enacted CERCLA to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems with abandoned and inactive hazardous waste disposal sites." *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990). CERCLA, however, does not expressly include successors in its statutory scheme of liability. Instead, in the statutory provision discussing "covered persons," CERCLA simply provides that:

> (1) the owner and operator of a vessel or a facility,
>
> [and]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> . . . shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State.

42 U.S.C. § 9607(a)(1)-(2). Based upon this statutory language, entities have sought to avoid CERCLA liability by arguing that as a successor they do not satisfy the statutory definition of "covered person." Despite the statutory silence with respect to successor liability, courts that have considered this issue have consistently determined that Congress could not have intended to exempt successors from the reach of CERCLA liability. *See* cases cited in the preceding paragraph of text.

"persons most responsible for plan liabilities." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037 (codified at note following 26 U.S.C. § 9701 (1994)). Here, the benefits of the miners' labor inured to Jericol as a successor to Shackleford, and it is the "most responsible party" to shoulder the responsibility of Combined Fund liability

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 20, 2001

Supreme Court, U.S.
FILED
JUN 21 2001
CLERK

No. 00-1307

# In the Supreme Court of the United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

SIGMON COAL COMPANY, INC., AND JERICOL MINING, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## JOINT APPENDIX

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**PETITION FOR A WRIT OF CERTIORARI FILED: FEB. 13, 2001**
**CERTIORARI GRANTED: APR. 23, 2001**

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NOTICE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
(BIG STONE GAP)

No. 96-CV-148

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | DOCKET ENTRIES |
|---|---|---|
| 6/25/96 | 1 | COMPLAINT Filing Fee $ 120.00 Receipt # 78733 Service due 10/23/96 for Commissioner, SS (lh) [Entry date 06/28/96] |
| 10/27/97 | 19 | MOTION for Summary Judgment by Sigmon Coal Company, Jericol Mining, Inc. (1b) |
| 7/9/98 | 31 | ORDER granting [30-1] motion for Leave to File a supplemental complaint (signed by Senior Judge Glen M. Williams) (lh) [Entry date 07/10/98] |
| 7/9/98 | 32 | AMENDED (SUPPLEMENTAL) COMPLAINT by Sigmon Coal Company, Jericol Mining, Inc. amending [1-1] complaint (lh) [Entry date 07/10/98] |

| DATE | DOCKET NUMBER | DOCKET ENTRIES |
|---|---|---|
| 11/18/98 | 34 | MEMORANDUM OPINION (signed by Senior Judge Glen M. Williams) (lb) |
| 11/18/98 | 35 | ORDER granting pltf's [19-1] motion for Summary Judgment, and denying dft's motion for summary judgment; dft ordered to Withdraw the assignments challenged by pltf Jericol in this case and notify Trustees of the UMWA Combined Benefit Fund that such assignments have been withdrawn. Dft enjoined from assigning additional retirees of Shackleford Coal Company, Inc. to pltf Jericol on basis that pltf is a related person to Shackleford Coal Company, Inc. (signed by Senior Judge Glen M. Williams) (lb) |
| 11/18/98 | -- | Case closed (lb) |



| DATE | DOCKET NUMBER | DOCKET ENTRIES |
|---|---|---|
| 12/3/98 | 36 | MOTION for Reconsideration of [35-1] order dft ordered to Withdraw the assignments challenged by pltf Jericol in this case and notify Trustees of the UMWA Combined Benefit Fund that such assignments have been withdrawn. Dft enjoined from assigning additional retirees of Shackleford Coal Company, Inc. to pltf Jericol on basis that pltf is a related person to Shackleford Coal Company, Inc. by Commissioner, SS (lb) [Entry date 12/08/98] |
| 12/18/98 | 39 | ORDER denying [36-1] motion for Reconsideration of [35-1] order dft ordered to Withdraw the assignments challenged by pltf Jericol in this case and notify Trustees of the UMWA Combined Benefit Fund that such assignments have been withdrawn. Dft enjoined from assigning additional retirees of Shackleford Coal Company, Inc. |

| DATE | DOCKET NUMBER | DOCKET ENTRIES |
|---|---|---|
| | | to pltf Jericol on basis that pltf is a related person to Shackleford Coal Company, Inc. (signed by Senior Judge Glen M. Williams) (lh) [Entry date 12/21/98] |
| 1/6/99 | 40 | MOTION to Stay portion of 12/21/98 order requiring dft to withdraw assignments challenged by Jerricol [*sic*] and notify Trustee of UMWA and Jericol w/10 days that such assignments have been withdrawn by Commissioner, SS (lb) [Entry date 01/08/99] |
| 1/21/99 | 42 | ORDER granting [40-1] motion to Stay portion of 12/21/98 order requiring dft to withdraw assignments challenged by Jerricol [*sic*] and notify Trustee of UMWA and Jericol w/10 days that such assignments have been withdrawn (signed by Senior Judge Glen M. Williams) (ls) |
| 2/12/99 | 43 | NOTICE OF APPEAL by Commissioner, SS. Order appealed: 12/18/98 Order by Judge Williams) (lmh) |



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Court of Appeals Docket #: 99-1219

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[Filed: February 22, 1999]

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**GENERAL DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 10/26/99 | Oral argument heard. Courtroom Deputy: jph/cpg. [99-1219] (cpg) |
| 8/29/00 | Published, authored opinion filed. [99-1219] (db) |
| 8/29/00 | Judgment order filed. Decision: affirmed. EOD Date: 8/29/00. [99-1219] (db) |
| 10/13/00 | Petition filed by Appellant Apfel, Commissioner for rehearing. Number copies filed: 20 [3268741-1]., for rehearing en banc. Number of copies filed: 20 [3268741-2] [99-1219] (db) |
| 10/16/00 | Response/answer requested to motion for rehearing [3268741-1], motion for rehearing en banc [3268741-2] [99-1219] (db) |

| DATE | PROCEEDINGS |
|---|---|
| 11/15/00 | COURT ORDER filed denying motion for rehearing [3268741-1] EOD Date: 11/15/00., denying motion for rehearing en banc [3268741-2] EOD Date: 11/15/00. Copies to all counsel. [99-1219] (db) |
| 11/27/00 | Mandate issued. [99-1219] (db) |
| 4/26/01 | Supreme Court order received granting petition certiorari [3337752-1] on 04/23/01. [99-1219] (dhb) |



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division

Civil Case No. 96-CV-148-B

SIGMON COAL COMPANY, INC. & JERICOL MINING, INC.,
PLAINTIFFS

*v.*

SHIRLEY S. CHATER
COMMISSIONER, SOCIAL SECURITY, ADMINISTRATION,
DEFENDANT

**COMPLAINT**

Plaintiffs, Sigmon Coal Company, Inc. and Jericol Mining, Inc., seek clarification of their obligations under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"), and request that this Court vacate certain beneficiary assignments the Commissioner of Social Security made to Plaintiffs pursuant to the Coal Act.

**I. THE PARTIES**

1. Plaintiff, Sigmon Coal Company, Inc. ("Sigmon"), is incorporated in the Commonwealth of Virginia and has its principal place of business in Keokee, Virginia. Sigmon currently conducts mining operations in Lee County, Virginia.

2. Plaintiff, Jericol Mining, Inc. ("Jericol"), is incorporated in Kentucky, and has its principal place of business in Harlan County, Kentucky.

3. Defendant, Shirley S. Chater, is the Commissioner of Social Security ("Commissioner"). The Social Security Administration ("SSA") administers and enforces various federal programs and performs other functions throughout the United States, including locations in the Commonwealth of Virginia within the jurisdiction of this Court. The Commissioner is responsible under the Coal Act for assigning beneficiaries in the United Mine Workers of America Combined Benefit Fund ("Combined Fund") to responsible operators. The Commissioner has delegated to various SSA Service Centers certain of her duties under the Act.

## II. JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 2201, 26 U.S.C. §§ 9706(f) and 9721, and 5 U.S.C. §§ 701-706.

5. Venue is proper in this district under 28 U.S.C. § 1391(e) in that Plaintiff Sigmon resides in and is conducting business in this judicial district.

## III. THE COAL ACT

6. Section 9706 of the Coal Act requires the Commissioner to assign each Combined Fund beneficiary to a signatory coal operator ("assigned operator").



7. Section 9704 of the Act requires that assigned operators pay an annual per-beneficiary health and death benefit premium to the Combined Fund.

8. Section 9704(a) of the Act provides that any related person to an assigned operator shall be jointly and severally liable for any premium required to be paid by the assigned operator. Thus, with respect to obligations imposed by the Coal Act, a related person is the same as an assigned operator.

## IV. BACKGROUND FACTS

9. By letters dated September 28 and October 7, 1993, the Commissioner assigned 20 Combined Fund beneficiaries to Jericol.

10. None of these beneficiaries ever worked for Jericol or for Sigmon. On information and belief, the signatory operator that actually employed these retired UMWA miners was Shackleford Coal Company, EIN 61-0606844 ("Shackleford"). On information and belief, SSA assigned these individuals ("the Shackleford retirees") to Jericol because the Commissioner decided that Jericol is a successor in interest to Shackleford within the meaning of Section 9701(c)(2)(A) of the Coal Act.

11. Pursuant to section 9706(f) of the Act, by letters dated June 9, 1994, Jericol requested the Commissioner to reconsider her decision that Jericol is a successor in interest to Shackleford.

12. By letters dated August 30 and September 8, 1994, the Commissioner rejected Jericol's request for reconsideration and informed the Company that her

assignment of the Shackleford retirees would not be withdrawn.

13. By letters dated June 30 and September 20, 1995 the Commissioner assigned 109 additional Shackleford retirees to Jericol. As with the initial assignments, these beneficiaries were assigned to Jericol on the basis that Jericol is a successor in interest to Shackleford.

14. In May 1996, the Combined Fund filed suit against Sigmon and Jericol in the United States District Court for the District of Columbia to collect premiums allegedly owed with respect to the Shackleford retirees. The Combined Fund alleged that Jericol and Sigmon are jointly and severally liable for the Shackleford retirees' premiums because they are "related persons" under the Coal Act.

## V. CAUSES OF ACTION

### First Count: Request for Declaratory Judgment

15. Paragraphs 1 through 14 above are incorporated by reference.

16. Section 9701(c)(2)(A) of the Coal Act provides that a successor in interest to a signatory operator is a "related person" to the signatory. The term "successor in interest" is not defined in the Coal Act.

17. The Coal Act is codified in the Internal Revenue Code ("IRC"). As a matter of law, the IRC definition of successor in interest is controlling for purposes of section 9701(c)(2)(A) of the Coal Act.

18. A "successor in interest" is defined at 26 C. F. R. § 1.1503-2(c)(12) as an acquiring corporation that succeeds to the tax attributes of the acquired corporation.



19. Jericol purchased certain Shackleford assets in 1973 for fair market value. However, Jericol did not accept or assume responsibility or liability for any person employed by Shackleford, and did not succeed to Shackleford's tax attributes. Sigmon has never had any connection to Shackleford.

20. Neither Sigmon nor Jericol is a successor in interest to Shackleford under the IRC, as amended by Section 9701(c)(2)(A) of the Coal Act. Therefore, neither Plaintiff is a related person to Shackleford.

21. The Commissioner's assignment of Shackleford's retirees to Plaintiffs must be vacated because it exceeds her authority under the Coal Act and is erroneous as a matter of law.

### Second Count: Review of Agency Action

22. Paragraphs 1 through 21 are hereby incorporated by reference.

23. The Commissioner's September and October 1993 assignment of Shackleford's retirees to Jericol on the basis that Jericol is a successor in interest to Shackleford was erroneous.

24. The Commissioner's September 30 and August 8, 1995 rejection of Jericol's June 9, 1994 request for reconsideration of the 1993 assignments was arbitrary and capricious and must be reversed because it violates the Administrative Procedure Act.

## VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. A declaration that neither Jericol nor Sigmon is a successor in interest to Shackleford within the meaning of 26 U.S.C. § 9701(c)(2)(A) .

2. An Order which directs the Commissioner to (i) withdraw the assignment of Shackleford's retirees to Jericol, and (ii) inform the Combined Fund that such assignments have been withdrawn.

3. An Order which enjoins the Commissioner from assigning any Shackleford retirees to Plaintiffs in the future.

4. Such other and further relief as this Court deems proper and just.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Big Stone Gap Division

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Civil Case No. 96 CV148-B

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SIGMON COAL COMPANY, INC. & JERICOL MINING, INC.,
PLAINTIFFS

*v.*

KENNETH S. APFEL, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION,
DEFENDANT

---

**SUPPLEMENTAL COMPLAINT**

Leave having been granted, Plaintiffs, Sigmon Coal Company, Inc. and Jericol Mining, Inc., file this Supplemental Complaint and show:

1. Paragraphs 1 through 24 of Plaintiffs' first Complaint, filed June 25, 1996, are hereby incorporated by reference.

2. Subsequent to the time when Plaintiffs' first Complaint was filed the U.S. Supreme Court issued its decision in *Eastern Enterprises v. Apfel*, No. 97-42 (U.S. June 25, 1998). The *Eastern* decision declared § 9706(a)(3) of the Coal Industry Retiree Health Benefits Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-9722 unconstitutional as applied to Eastern (the assigned operator) in that case.

3. The Supreme Court found that § 9706(a)(3) was unconstitutional as applied to Eastern because it sought to impose liability on Eastern for miners Eastern employed long before 1974.

4. The assignments at issue in this case impose retroactive liability on Jericol under facts even more extreme than those present in *Eastern*, because the miners in question did not even work for Jericol.

## VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following supplemental relief:

1. Paragraphs 1 through 4 of Plaintiffs' Prayer For Relief in the first Complaint, filed June 25, 1996, are hereby incorporated by reference.

2. A declaration that, based on the finding of the U.S. Supreme Court in *Eastern*, § 9706(a)(3) of the Coal Act is unconstitutional as applies to Jericol and Sigmon and the facts of the instant case.

3. Such other and further relief as this Court deems proper and just.

Respectfully submitted,

JOHN R. WOODRUM

JOHN R. WOODRUM
W. GREGORY MOTT
SMITH, HEENAN & ALTHEN
1110 Vermont Ave., N.W.
Suite 400
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MONTGOMERY LAW OFFICE
Highway 58 West
Jonesville Corporate Limits
Post Office Box 366
Jonesville, VA 24263-0366
(540) 346-2006

COUNSEL FOR PLAINTIFFS

July 2, 1998

**CONSENT OF STOCKHOLDERS OF SHACKLEFORD COAL COMPANY, INC.**

The undersigned, being the owners of all of the outstanding capital stock of Shackleford Coal Company, Inc., a Kentucky corporation, with its principal office and place of business at Crummies, Harlan County, Kentucky, do hereby consent to the following actions on behalf of the corporation and of its officers, to-wit:

(1) For Shackleford Coal Company, Inc., to enter into that certain Plan and Agreement for Purchase of Assets, dated the 31st day of May, 1973, by and between Shackleford Coal Company, Irdell Mining, Inc., and The Dale Company, concerning the sale of the coal mining operation and the coal leases of Shackleford Coal Company, Inc., to Irdell Mining, Inc., and to The Dale Company, and hereby consent for its approval by the Board of Directors, and the authorization of the Board of Directors; for the President and Secretary of the Corporation to execute said Plan and Agreement for Purchase of Assets on behalf of Shackleford Coal Company, Inc., and to execute all documents necessary to carry out the obligations of Shackleford Coal Company, Inc., under said agreement.

(2) To permit Irdell Mining, Inc., to use the name of Shackleford Coal Company or Shackleford Coal Company, Inc., and for the President and Secretary of Shackleford Coal Company, Inc., to sign and deliver to Irdell Mining, Inc., consent authorizing such use.

(3) To the amendment of Article I of the Articles of Incorporation of Shackleford Coal Company, Inc., so as to change the name of the corporation from Shackleford Coal Company, Inc., to Kelley & Associates, Inc.



WITNESS OUR HANDS as of the 30th day of May, 1973.

HENRY SHACKLEFORD ESTATE

By RAYMOND COLE
RAYMOND COLE
Co-Executor

BYRD SHACKLEFORD
Co-Executor

SAM SHACKLEFORD
Co-Executor

BYRD SHACKLEFORD
BYRD SHACKLEFORD
Co-Executor

SAM SHACKLEFORD
SAM SHACKLEFORD

JAMES E. KELLEY
JAMES E. KELLEY

REBA KATHRYN COLE
REBA KATHRYN COLE

EVLA SHACKLEFORD
EVLA SHACKLEFORD

**BILL OF SALE**

For value received, Shackleford Coal Company hereby transfers and sells to Irdell Mining, Inc. all rights, title and interest in and to the following assets owned by it:

(1) The leasehold improvements, machinery and equipment, trucks and automobiles and office equipment listed and described on Exhibit A attached hereto;

(2) The entire inventory of coal of Shackleford Coal Company as of the close of business on May 31, 1973; and

(3) All supplies of Shackleford Coal Company as of the close of business on May 31, 1973.

Dated this 1st day of June, 1973.

Attest: SHACKLEFORD COAL COMPANY

JAMES E. KELLEY
Secretary

By BYRD L. SHACKLEFORD
President

COMMONWEALTH OF KENTUCKY )
) SS:
COUNTY OF HARLAN )

I, the undersigned, a Notary Public in and for the County and State above written, do hereby certify that the foregoing Bill of Sale was this day signed and acknowledged before me by the President and Secretary of Shackleford Coal Company as being executed by them for and on behalf of said corporation.



In Testimony Whereof, I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

RAYMOND COLE
My Comm. Expires 9-10-76
Notary Public

Receipt of this Bill of Sale from Shackleford Coal Company by Irdell Mining, Inc. is hereby acknowledged this 1st day of June, 1973.

IRDELL MINING, INC.

By JAMES A. SIGMON
President

**PLAN AND AGREEMENT FOR PURCHASE OF ASSETS**

THIS PLAN AND AGREEMENT FOR PURCHASE OF ASSETS (hereinafter referred to as "this Agreement") is entered into this 31st day of May, 1973, by and between SHACKLEFORD COAL COMPANY (hereinafter referred to as "Shackleford"), IRDELL MINING, INC. (hereinafter referred to as "Irdell") and THE DALE COMPANY (hereinafter referred to as "Dale");

WITNESSETH:

WHEREAS, the officers and Board of Directors of Shackleford have determined that it is desirable that Shackleford sell certain assets owned by it to Irdell and Dale upon the terms and conditions herein set forth; and

WHEREAS, the officers and Board of Directors of Irdell and the partners of Dale have determined that it is desirable that they purchase these assets of Shackleford upon the terms and conditions herein set forth;

NOW, THEREFORE, in order to consummate the transactions set forth herein and in consideration of the mutual covenants, agreements, representations and warranties hereinafter contained, the parties hereto agree as follows:



**ARTICLE I**

**THE PARTIES TO THIS AGREEMENT**

Section 1.01. Shackleford. Shackleford is a Kentucky corporation engaged in the business of mining, processing and selling coal.

Section 1.02. Irdell. Irdell is a corporation organized under the laws of the Commonwealth of Kentucky. It is authorized to engage in the business of mining, processing and selling coal.

Section 1.03. Dale. Dale is a Kentucky partnership organized for the purpose of acquiring leases of coal properties and subleasing such properties to companies engaged in the coal mining business.

**ARTICLE II**

**SALE AND TRANSFER OF ASSETS**

Section 2.01. Sale of Operating Assets by Shackleford.

(A) At the closing, Shackleford shall sell, convey, grant, assign, transfer and deliver to Irdell and Irdell shall purchase, accept and receive from Shackleford all leasehold improvements, machinery and equipment, trucks and automobiles and office equipment, all as listed and described on Exhibit A attached hereto and used or held by it for use in the production and mining of coal.

(B) The purchase price for the assets set forth on Exhibit A attached hereto shall be the book value

thereof as of the date of closing. This amount shall be paid in cash by Irdell to Shackleford at the closing.

Section 2.02. Sale of Coal Inventory by Shackleford.

(A) At the closing, Shackleford shall sell, convey, grant, assign, transfer and deliver to Irdell and Irdell shall purchase, accept and receive from Shackleford the coal inventory of Shackleford (exclusive of any coal already loaded in railroad cars) as of the date of closing.

(B) The purchase price for this coal inventory shall be such amount as is determined by multiplying the coal inventory at the date of closing by $7.50 per ton. This amount shall be paid in cash by Irdell to Shackleford at the closing.

Section 2.03. Sale of Supplies by Shackleford.

(A) At the closing, Shackleford shall sell, convey, grant, assign, transfer and deliver to Irdell and Irdell shall purchase, accept and receive from Shackleford all supplies of Shackleford as of the date of closing.

(B) The purchase price for such supplies shall be the cost thereof to Shackleford as of the date of closing. This amount shall be paid in cash by Irdell to Shackleford at the closing.

Section 2.04. Transfer of Leases, Contracts and Commitments.

(A) At the closing, Shackleford shall transfer to Irdell all its rights under the leases set forth on Exhibit B attached hereto, plus any additional leases entered into by it between the date hereof and the date of closing in the ordinary course of business or as to which



Irdell has consented in writing. Irdell shall correspondingly assume all the obligations and responsibilities of Shackleford under such leases.

(B) At the closing, Shackleford shall likewise transfer to Irdell all its rights under the contracts and commitments (including its employee reserve account and rate for Kentucky Unemployment Insurance purposes) set forth on Exhibit C attached hereto, plus any additional contracts and commitments entered into by it between the date hereof and the date of closing in the ordinary course of business or as to which Irdell has consented in writing. Irdell shall correspondingly assume all the obligations and responsibilities of Shackleford under such contracts and commitments.

Section 2.05. Sale of Leases and Subleases by Shackleford.

(A) At the closing, Shackleford shall sell, convey, grant, assign, transfer and deliver to Dale and Dale shall purchase, accept and receive from Shackleford all its right, title and interest in and to the leases and subleases set forth on Exhibit D attached hereto. At the closing, Dale shall assume all the obligations and responsibilities of Shackleford under these leases and subleases and shall agree to indemnify and hold Shackleford harmless in connection with any liability in connection therewith.

(B) The purchase price for the leases and subleases set forth on Exhibit D attached hereto shall be Three Million Five Thousand Six Hundred Eighty-Three Dollars ($3,005,683.00), less the amount of Thirty Thousand Dollars ($30,000.00) per month from January 1, 1973 to the date of closing and also less the amounts

received by Shackleford under the provisions of Subparagraph (B) of Section 2.01, Subparagraph (B) of Section 2.02 and Subparagraph (B) of Section 2.03. This amount shall be paid in cash by Dale to Shackleford at the closing.

Section 2.06. Capital Expenditures by Shackleford. It is recognized by the parties hereto that, between January 1, 1973 and the closing, Shackleford may be required to make various capital expenditures. As to any such capital expenditures which are approved in writing by Irdell, Shackleford shall be entitled to reimbursement for its cost of all such assets by Irdell at the closing (other than the purchase of equipment from Glenbrook Equipment Company) and ownership of all such capital assets (including the equipment acquired by Shackleford from Glenbrook Equipment Company) shall be transferred by Shackleford to Irdell at the closing.

Section 2.07. Proration of Expenses. As to any expenses paid by Shackleford, a portion of which is attributable to the operation of Irdell or Dale and inures to their benefit, the cost thereof shall be prorated as of the date of closing. As to any expenses paid by Irdell or Dale and attributable to operations of Shackleford and inured to its benefit, the cost thereof shall be prorated as of the date of closing.



## ARTICLE III

## REPRESENTATIONS AND WARRANTIES OF SHACKLEFORD

Shackleford jointly and severally represents, warrants and covenants as follows:

Section 3.01. Organization and Standing. Shackleford is duly organized, validly existing and in good standing under the laws of the Commonwealth of Kentucky. It has full power and lawful authority to carry on the business of mining, processing and selling coal, in which it is now engaged. Shackleford has full power and authority to execute and carry out the terms of this Agreement.

Section 3.02. Approval of Plan. The Board of Directors of Shackleford has approved this Agreement and has called a special meeting of its shareholders to be held on May 30, 1973, for the purpose of adopting this Agreement in accordance with the governing instruments of Shackleford and the laws of the Commonwealth of Kentucky.

Section 3.03. Title to Properties. Shackleford has good and marketable title to all of the personal property and assets reflected on Exhibit A attached hereto. There will be no liens or encumbrances (whether by mortgage, pledge, lien, conditional sales contract or otherwise) against such properties and assets on the date of closing.

Section 3.04. Leases.

(A) Exhibit D attached hereto lists all the leases and subleases pursuant to which real property located in Harlan County, Kentucky, is held under lease by Shackleford. All of these leases and subleases are valid and subsisting and in full force and effect. Shackleford is not in default under any of these leases or subleases.

(B) The leases and subleases set forth on Exhibit D cover 3,166 acres of property, more or less, in Harlan County, Kentucky, and permit the mining to exhaustion of the coal in the seams shown on Exhibit D underlying the properties covered by these various leases and subleases.

(C) Exhibit B attached hereto lists all the leases pursuant to which personal property is held under lease by Shackleford. All of these leases are valid and subsisting and in full force and effect. Shackleford is not in default under any of these leases.

Section 3.05. Contracts and Commitments. Exhibit C attached hereto lists all the contracts, agreements and commitments to which Shackleford is a party. All of these contracts, agreements and commitments are valid and subsisting and in full force and effect. Shackleford is not in default under any of these contracts, agreements or commitments.

Section 3.06. Labor Contract. Shackleford has a union contract with the United Mine Workers. A copy of this union contract is attached hereto as Exhibit E. This contract is valid and subsisting and in full force and effect. Shackleford is not in default under this union contract.



Section 3.07 Salaries. Exhibit F attached hereto lists the names, positions and current salary rates of all non-union officers and other employees of Shackleford. Exhibit F also sets forth the bonus, additional compensation and other like benefit arrangements which Shackleford has with any such officers and employees.

Section 3.08. Employee Benefit Plans. Except as set forth on Exhibit G hereto and under its United Mine Workers labor contract, Shackleford does not have any pension, profit-sharing, retirement, insurance, incentive, deferred compensation, bonus or other employee benefit plans.

Section 3.09. Litigation. Except as set forth on Exhibit H hereto, there is no litigation, investigation or proceeding pending or threatened involving Shackleford.

Section 3.10. Insurance. Shackleford has and, upon the date of closing, will continue to have in effect the insurance coverage set forth on Exhibit I attached hereto. This insurance protection is adequate in amounts, types and risks insured against in accordance with normal trade practices in similar businesses.

Section 3.11. Financial Statements. Attached hereto as Exhibit J is an unaudited management balance sheet of Shackleford as of September 30, 1972 and an unaudited management statement of income for the year ended September 30, 1972. Attached hereto as Exhibit K is an unaudited management balance sheet of Shackleford as of December 31, 1972 and an unaudited management statement of income for the three-month period ended December 31, 1972. Such balance sheets and the statements of income have been prepared in

substantial conformity with generally accepted accounting principles applied on a consistent basis. Such balance sheets and the statements of income fairly present the financial position of Shackleford at September 30, 1972 and December 31, 1972 and the results of its operations for the periods then ending.

Section 3.12. Absence of Changes.

(A) Except as specifically set forth on Exhibit L attached hereto, there have been and will be no material changes in the financial condition, assets, liabilities or business of Shackleford from September 30, 1972 to the date of closing, other than changes in the ordinary course of business, none of which have been or will be materially adverse.

(B) Since September 30, 1972, Shackleford has not entered into any transaction or incurred any liabilities not in the ordinary course of business.

Section 3.13. Compliance with Laws. Shackleford is in substantial compliance with all applicable laws, regulations and administrative orders of the United States, the Commonwealth of Kentucky and every subdivision of the Commonwealth of Kentucky to which it is subject and, on the date of closing, will be in compliance with all such laws (but exclusive of any Bulk Sales Act or similar statute).

Section 3.14. Execution and Performance of Agreement. The execution and performance of the terms of this Agreement and the transactions contemplated thereby by Shackleford will not violate the provisions of any law, contract, agreement or instrument by which Shackleford is bound.



## ARTICLE IV

## REPRESENTATIONS AND WARRANTIES OF IRDELL

Irdell represents, warrants and covenants as follows:

Section 4.01. Organization and Standing. Irdell is duly organized, validly existing and in good standing under the laws of the Commonwealth of Kentucky. It has full power and lawful authority to carry on the business of mining, processing and selling coal. Irdell has full power and authority to execute and carry out the terms of this Agreement.

Section 4.02. Approval of this Agreement. The Board of Directors of Irdell has approved this Agreement.

Section 4.03. Execution and Performance of Agreement. The execution and performance of the terms of this Agreement and the transactions contemplated thereby by Irdell will not violate any provision of any law (including the applicable laws of the Commonwealth of Kentucky), contract, agreement or instrument by which Irdell is bound.

## ARTICLE V

## REPRESENTATIONS AND WARRANTIES OF DALE

Dale represents, warrants and covenants as follows:

Section 5.01. Organization and Standing. Dale is a duly organized and validly existing Kentucky partnership. It has full power and lawful authority to acquire leases of coal property and sublease such prop-

erties to companies engaged in the coal mining business.

Section 5.02. Approval of this Agreement. The partners of Dale have approved the execution of this agreement.

Section 5.03. Execution and Performance of Agreement. The execution and performance of the terms of this Agreement and the transactions contemplated thereby by Dale will not violate any provisions of any law (including the applicable laws of the Commonwealth of Kentucky), contract, agreement or instrument by which Dale is bound.

## ARTICLE VI

## CONDUCT OF BUSINESS PENDING CLOSING

Section 6.01. Conduct of Business of Shackleford. Except as otherwise agreed to in writing by Irdell and Dale, Shackleford covenants and agrees that, from the date hereof to the date of closing:

(A) The business of Shackleford will be conducted in the usual manner in which it has been conducted;

(B) No increases will be made in the compensation payable by Shackleford to any of its employees;



(C) No contract or other commitment will be entered into by or on behalf of Shackleford, except any contract or commitment entered into in the ordinary course of business and involving less than Ten Thousand Dollars (10,000.00);

(D) No sale, transfer or other disposition and no mortgage, pledge or other encumbrance of any asset will be made or entered into by or on behalf of Shackleford; and

(E) Shackleford will use its best efforts to preserve its business and keep its business organization intact; attempt to keep available to Shackleford the services of its present employees and agents; and preserve for Shackleford the goodwill of its customers, suppliers and others having business relations with it.

Section 6.02. Access and Information. Shackleford will cause Irdell and Dale, their counsel, accountants and other representatives, to have full access, during normal business hours, throughout the period prior to the date of closing, to all the books, leases, contracts, commitments, minutes and records of Shackleford and shall cause to be furnished to Irdell and Dale and their representatives during such period all such information concerning the affairs of Shackleford as Irdell and Dale and their representatives may reasonably request.

## ARTICLE VII

## CONDITIONS PRECEDENT TO THE OBLIGATIONS OF IRDELL AND DALE

All obligations of Irdell and Dale under this Agreement shall be subject to the fulfillment, prior to the date of closing, of each of the following conditions, except to the extent any such conditions are expressly waived in writing by Irdell and Dale prior to the date of closing:

Section 7.01. Accuracy of Representations and Warranties. All of the representations and warranties made by Shackleford shall be true as of the date of this Agreement and shall likewise be true in all material respects as of the date of closing. Shackleford shall also have furnished to Irdell and Dale a duly authorized certificate signed on its behalf by its President and Secretary and dated as of the date preceding the date of closing which shall certify to the truth of all such representations and warranties.

Section 7.02. Opinion of Counsel. Shackleford shall have furnished to Irdell and Dale an opinion or opinions of Messrs. Greene & Forester, Harlan, Kentucky, counsel for Shackleford, in form and substance satisfactory to Irdell and Dale, dated as of the date preceding the date of closing, to the effect that:

(A) Shackleford is duly organized, validly existing and in good standing under the laws of the Commonwealth of Kentucky; has corporate powers sufficient to carry on its business as presently conducted; and has



corporate power to enter into and carry out the terms of this Agreement;

(B) The execution, delivery and performance of the terms of this Agreement by Shackleford have been authorized and approved by all requisite action of its Board of Directors; this Agreement has been duly adopted by the stockholders of Shackleford; this Agreement has been duly executed and delivered by Shackleford; and, assuming proper execution and delivery by Irdell and Dale, this Agreement constitutes a valid and binding obligation of Shackleford in accordance with its terms;

(C) This Agreement complies with the requirements of the laws of the Commonwealth of Kentucky for the sale of the assets covered by this Agreement (but not including any Bulk Sales Act or similar statute);

(D) That, upon the sale becoming effective, the property and assets of Shackleford covered by this Agreement will become the property of Irdell or Dale as provided for herein;

(E) There are no liens or encumbrances of record upon any real or personal property of Shackleford; and

(F) Counsel does not know of any material litigation, proceeding or governmental investigation pending or threatened against or relating to Shackleford, its properties, its business or the transactions contemplated by this Agreement or of any contract, agreement or instrument by which Shackleford is bound which would be violated by the execution and performance of this Agreement.

Section 7.03. Additional Documents. Shackleford shall have furnished Irdell and Dale with the following:

(A) The Employment Agreements attached hereto as Exhibits M, N, O, P and Q, signed respectively by Raymond E. Cole, James E. Kelley, Sam A. Shackleford, Douglas B. Shackleford and Thomas Shackleford;

(B) The Agreement Not to Compete attached hereto as Exhibit R signed by Byrd L. Shackleford;

(C) A title opinion of Messrs. Green & Forester, Harlan, Kentucky, counsel for Shackleford, or other counsel acceptable to Dale, covering the coal leases owned by Shackleford sufficient to enable Dale to obtain title insurance covering such leases at customary premium rates;

(D) A properly executed Consent for Irdell to use the corporate name "Shackleford Coal Company" and a properly executed Amendment to the Articles of Incorporation of Shackleford changing its corporate name to Kelley & Associates, Inc.;

(E) A certified copy of resolutions duly adopted by the Board of Directors of Shackleford approving this Agreement, authorizing its execution and delivery and approving the transactions contemplated hereby;

(F) A certified copy of resolutions duly adopted by the holders of all the outstanding stock of Shackleford adopting this Agreement; and

(G) Such other documents as may be reasonably required by Irdell and Dale and their counsel to perfect the consummation of the transactions hereunder duly executed by Shackleford.



## ARTICLE VIII

## CONDITIONS PRECEDENT TO THE OBLIGATIONS OF SHACKLEFORD

All obligations of Shackleford under this Agreement shall be subject to the fulfillment, prior to the date of closing, of each of the following conditions, except to the extent any such conditions are expressly waived in writing by Shackleford prior to the date of closing:

Section 8.01. Accuracy of Representations and Warranties. All of the representations and warranties made by Irdell and Dale shall be true as of the date of this Agreement and shall likewise be true in all material respects as of the date of closing. Irdell and Dale shall also have furnished to Shackleford a duly authorized certificate signed, on behalf of the corporation, by the President of Irdell and dated as of the date preceding the date of closing and Dale shall have furnished to Shackleford a duly authorized certificate signed, on behalf of the partnership, by a General Partner of Dale and dated as of the date preceding the date of closing, both of which shall certify to the truth of all such representations and warranties.

Section 8.02. Opinion of Counsel. Irdell shall have furnished to Shackleford an opinion or opinions of Messrs. Dinsmore, Shohl, Coates & Deupree, Cincinnati, Ohio, counsel for Irdell, or other counsel acceptable to Shackleford, in form and substance satisfactory to Shackleford, dated as of the date preceding the date of closing, to the effect that:

(A) Irdell is duly organized, validly existing and in good standing under the laws of the Commonwealth of

Kentucky and has corporate powers sufficient to carry on its business as presently conducted;

(B) The execution, delivery and performance of the terms of this Agreement by Irdell have been authorized and approved by all requisite action of the Board of Directors of Irdell; and, assuming proper execution and delivery by Shackleford, this Agreement constitutes a valid and binding obligation of Irdell in accordance with its terms; and

(C) Irdell has complied with any requirements of the laws of the Commonwealth of Kentucky for the acquisition by it of the assets of Shackleford covered by this Agreement and the performance of the provisions of this Agreement will not violate any laws of the Commonwealth of Kentucky.

Section 8.03. Opinion of Counsel. Dale shall have furnished to Shackleford an opinion or opinions of Messrs. Dinsmore, Shohl, Coates & Deupree, Cincinnati, Ohio, counsel for Dale, or other counsel acceptable to Shackleford, in form and substance satisfactory to Shackleford, dated as of the date preceding the date of closing, to the effect that:

(A) Dale is a duly organized and validly existing Kentucky partnership and has power sufficient to carry on its business of leasing and subleasing coal properties;

(B) The execution, delivery and performance of the terms of this Agreement by Dale have been authorized and approved by all requisite action of the partners of Dale; and, assuming proper execution and delivery by Shackleford, this Agreement constitutes a valid and



binding obligation of Dale in accordance with its terms; and

(C) Dale has complied with any requirements of the laws of the Commonwealth of Kentucky for the acquisition by it of the assets of Shackleford covered by this Agreement and the performance of the provisions of this Agreement will not violate any laws of the Commonwealth of Kentucky.

Section 8.04. Additional Documents. Irdell and Dale shall have furnished Shackleford with the following:

(A) A certified copy of resolutions duly adopted by the Board of Directors of Irdell approving this Agreement, authorizing its execution and delivery and approving the transactions contemplated hereby;

(B) The Employment Agreements and Non-Compete Agreement attached hereto as Exhibits M, N, O, P, Q and R each signed by an officer of Irdell; and

(C) Such other documents as may be reasonably required by Shackleford and its counsel to perfect the consummation of the transactions hereunder duly executed by the appropriate officers of Irdell.

## ARTICLE IX

## ENFORCEMENT OF REPRESENTATIONS, WARRANTIES & AGREEMENTS

Section 9.01. Enforcement Against Shackleford. The representations, warranties and agreements made by Shackleford herein, except as they may be fully performed prior to or on the date of closing, shall survive the closing for a period of three years and shall be fully enforceable at law or in equity against Shackleford and its assigns, by Irdell and Dale and their successors and assigns.

Section 9.02. Right to Defend. If any claim should be made against the property or assets covered by this Agreement by any third party, Irdell or Dale agree to promptly notify Shackleford or its assigns of such claim. If Shackleford (or such assigns) desires to do so, it may either join in the defense of such case or it may assume the full responsibility for the defense of such case. Any such action by Shackleford or its assigns shall be at its cost and expense.

## ARTICLE X

## CLOSING

Section 10.01. Date. The closing hereunder shall take place at 11:00 A.M. on June 1, 1973, or as soon thereafter as is practicable but, in any event, not later than June 30, 1973, at the offices of Shackleford in Harlan, Kentucky, or at such other time or place as the parties hereto shall mutually agree upon in writing.



Section 10.02. Delivery of Documents at the Closing.

(A) At the closing, Shackleford shall deliver to Irdell such bills of sale, assignments and other documents of transfer as shall be necessary to transfer ownership of the properties described on Exhibit A attached hereto and the coal inventory and supplies of Shackleford of the date of closing. At the closing, Shackleford shall likewise deliver to Irdell such bills of sale, assignments and other documents of transfer as shall be necessary to transfer to Irdell all its rights under the leases, contracts and commitments set forth on Exhibits B and C attached hereto.

(B) At the closing, Irdell shall deliver to Shackleford the cash payments provided for in Sections 2.01, 2.02, 2.03, 2.04 and 2.06 of Article II of this Agreement. At the closing, Irdell shall likewise deliver to Shackleford the agreements assuming all the obligations and responsibilities of Shackleford under the leases, contracts and commitments set forth on Exhibits B and C attached hereto.

(C) At the closing, Shackleford shall deliver to Dale such assignments and other documents of transfer as shall be necessary to transfer to Dale all its rights under the leases set forth on Exhibit D attached hereto.

(D) At the closing, Dale shall deliver to Shackleford the cash payment provided for in Section 2.05 of Article II of this Agreement. At the closing, Dale shall likewise deliver to Shackleford its agreements assuming all the obligations and responsibilities of Shackleford under the leases set forth on Exhibit D attached hereto.

## ARTICLE XI

## GENERAL PROVISIONS

Section 11.01. Broker Fees.

(A) Shackleford warrants to Irdell and Dale that it has not employed any broker or finder in connection with this transaction; and

(B) Irdell and Dale warrant to Shackleford that they have not employed any broker or finder in connection with this transaction.

Section 11.02. Amendment. This Agreement shall not be amended or modified except by means of a written instrument executed by Shackleford, Irdell and Dale.

Section 11.03. Parties and Interest. This Agreement shall inure to the benefit of and be binding upon Shackleford, Irdell and Dale and their respective successors and assigns. Nothing in this Agreement, expressed or implied, is intended to confer upon any other person, other than the parties hereto, any rights or remedies under or by reason of this Agreement.

Section 11.04. Termination of this Agreement.

(A) This Agreement and the transactions contemplated hereby may be terminated at any time prior to the date of closing:

(1) By mutual consent of the Boards of Directors of Shackleford and Irdell and the partners of Dale;



(2) By Shackleford if any of the conditions of Article VIII of this Agreement have not been met or have not been waived and/or there shall have been a material misrepresentation or breach of warranty on the part of Irdell and Dale in the representations and warranties set forth in Articles IV and V of this Agreement; or

(3) By the Board of Directors of Irdell and the partners of Dale if any of the conditions provided in Article VII of this Agreement have not been met or have not been waived and/or there shall have been a material misrepresentation or breach of warranty on the part of Shackleford in the representations and warranties set forth in Article III of this Agreement.

Section 11.05. Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly delivered if delivered in person or mail, first class postage prepaid or by telegram as follows:

(A) If to Shackleford, to:

Mr. Raymond C. Cole
Harlan, Kentucky 40831

with a copy to:

Mr. James S. Greene, Jr.,
Greene & Forester
Horton Building
Harlan, Kentucky 40831

(B) If to Irdell, to:

Mr. James A. Sigmon
Post Office Box 501
Pineville, Kentucky 40977

with a copy to:

Mr. Bart A. Brown, Jr.
Dinsmore, Shohl, Coates & Deupree
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202

(C) If to Dale, to:

Mr. James A. Sigmon
Post Office Box 501
Pineville, Kentucky 40977

with a copy to:

Mr. Bart A. Brown, Jr.
Dinsmore, Shohl, Coates & Deupree
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202

Section 11.06. Entire Agreement. This Agreement sets forth the entire understanding of the parties hereto and supersedes any and all prior agreements, arrangements and understandings relating to the subject matter hereof. No party shall be deemed or construed to have made any representation or warranty as a result of execution of this Agreement nor shall any representation or warranty be implied from such execution except representations and warranties which are expressly set forth herein.

Section 11.07. Counter Parts. This Agreement may be executed simultaneously in several counter parts, each of which shall be deemed any original part which



together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have duly executed this Agreement as of the date written above.

Attest: SHACKLEFORD COAL COMPANY

By illegible
Secretary

By illegible
President

Attest: IRDELL MINING, INC.

By illegible
Secretary

By illegible
President

THE DALE COMPANY

By illegible
General Partner

**Social Security Administration**
Important Information

Southeastern Program Service Center
P.O. Box 10728
Birmingham, Alabama 35202
Date: 09/28/93

JERICOL MINING INC
RT 1 BOX 1000
CUMBERLAND GAP TN 37724-9801 EIN: 61-0844927

We are writing to you about the Coal Industry Retiree Health Benefit Act of 1992. Under this law, we must assign responsibility as explained below for the payment of health and death benefit premiums for retired miners and their relatives who qualify. To qualify, the miners or their relatives must have been qualified for and receiving benefits under a prior United Mine Workers of America (UMWA) benefit plan as of July 20, 1992.

We have reviewed our earnings records of retired coal miners identified by the UMWA benefit plans and decided that you are the operator responsible for the premiums for the beneficiaries named on the enclosed list. This list also explains why we have assigned you responsibility for the benefit premiums of these beneficiaries.

You will hear from the UMWA Combined Benefit Fund with more information about the benefit premiums. We will let you know of any other assignments we may make to you.



**To Whom We May Assign Responsibility for Premiums**

We may assign responsibility for premiums to either:

- a signatory operator that formerly employed the miner, or
- a company related to such signatory operator that is no longer in business.

**Who is a Signatory Operator and Its Related Company**

A signatory operator is an employer who signed an agreement with the UMWA meeting certain requirements of the new law. A related company is either:

- a member of the controlled group of corporations (within the meaning of 26 United States Code (U.S.C.) 52(a)) that includes the signatory operator; or
- a trade or business under common control (as determined by 26 U.S.C. 52(b)) with the signatory operator; or
- any other person, other than a limited partner, having a partnership interest or joint venture with a signatory operator in a business within the coal industry that employed the miner; or
- a successor in interest to any of the companies described above.

A related company must have met one of the four conditions defined above as of July 20, 1992, or if earlier, right before the signatory ceased to be in business.

**How We Assign Responsibility**

We assign responsibility to an operator who our records show employed the miner in the coal industry under an UMWA agreement. The operator must still be in business. If the operator is no longer in business, we assign responsibility to the operator's related company that is still in business. We assign responsibility using the following order of priority:

- the last operator to employ the miner under an agreement for at least two years if that operator was also a signatory to a 1978 or later agreement; or
- the last operator to employ the miner under an agreement if that operator was also a signatory to a 1978 or later agreement; or
- the operator who employed the miner under an agreement for the longest period of time before 1978.

If the signatory operator that employed the miner is no longer in business, its premium responsibility must be assumed by any related company still in business.

**If You Disagree**

If you disagree with the assignment to you of anyone on the enclosed list, you have the right to ask us to review the assignment. But first, you may want to write us at the address at the top of this letter and ask to see the miner's earnings record and the basis for the assignment. After looking at this information, if you still disagree, you can write to us at the same address and ask us to review the assignment.



To ask for a review, you must explain in writing why you disagree and either give us evidence that, standing alone, shows our assignment was in error or ask for extra time to gather evidence. If you do not give us evidence, we will not review the assignment.

Some examples of evidence we would consider include federal, State or local tax records and legal documents such as incorporation, merger and bankruptcy papers, health and safety reports filed with federal or State agencies that regulate mining activity, payroll and other employment business records, and information in trade journals and newspapers.

- You have 30 days from the day you receive this letter to either request the earnings record and the basis for the assignment or ask for a review.
- If you request the earnings record and the basis for the assignment, the 30 days to ask for a review start the day after you receive them. If you do not request this information, the 30 days to ask for a review start the day after you receive this letter.
- If you want extra time to gather evidence, you must ask for it in your written request for review. You will then have 90 days from the day you request a review to give us the evidence you want us to consider.

Unless you show otherwise, we assume that you receive any letter from us within 5 days of the date on the letter.

**If You Have Any Questions**

If you have any questions about this letter, please call us at 205-801-2600. If you do call please have this letter with you. It will help us answer your questions.

You can also write us at the address shown at the top of this letter. Please write to us if you want us to review the assignment.

If you have any questions about your responsibilities as an assigned operator under this new law, you should contact the UMWA Combined Benefit Fund at the address below:

UMWA Combined Benefit Fund
4455 Connecticut Ave. N.W.
Washington, D.C. 20008
(202) 895-3700

/s/ CAROLYN W. NEYMAN
Assistant Regional Commissioner
Processing Center Operations



**EIN: 61-0844927** **Page 1**

**List of Assigned Miners and Other Beneficiaries**

Below we identify the miner(s) and their eligible relatives that we have assigned to you. We also show the reason we believe you are responsible for the coal industry health and death benefit premiums for those individuals.

Our records and UMWA records indicate that you are related to the signatory operator named below who is no longer in business. This operator would have been responsible under the law for the miner named below under the rules for how we assigned responsibility explained on page 2. Therefore, as a related company you must assume responsibility.

NOTE: Entries under "Dates Miner Employed" that display only the month and year indicate that the miner worked for one or more months in the calendar quarter ending with the month displayed.

Asterisk (*) denotes miner.

| Miners and Other Beneficiaries | | SSN | Dates Miner Employed by Signatory Company | Signatory Operator Name |
|---|---|---|---|---|
| * FLEENOR | WHEELER | E | 9/64-12/68, 6/69 | SHACKLEFORD COAL CO INC |
| FLEENOR | MAGDALENE | | | |
| * KELLY | CLARENCE | | 12/65-6/73 | SHACKLEFORD COAL CO |
| KELLY | JUANITA | | | |
| * LONG | G | L | 6/64-12/76, 6/77 | SHACKLEFORD COAL CO. |
| LONG | GEORGIA | | | |
| LONG | SHAWN | D | | |
| LONG | BRANNON | D | | |



LAW OFFICES
SMITH, HEENAN & ALTHEN
[LETTERHEAD OMITTED]
SUITE 400
1110 VERMONT AVENUE, N.W.
WASHINGTON, D.C. 20005-3593
(202) 887-0800
FAX (202) 775-8518
[ADDRESS OMITTED]

VIA CERTIFIED MAIL

– April 9, 1997

Anne Jacobosky
Assistant Regional Commissioner
Processing Center Operations
Social Security Administration
Northeastern Program Service
P.O. Box 6300
Jamaica, NY 11431
**Return Receipt**
**# Z 068 876 725**

Donna Y. Mukogawa
Acting Regional Commissioner
Processing Center Operations
Social Security Administration
Great Lakes Progam Service
P.O. Box 87109
Chicago, IL 60680
**Return Receipt**
**# Z 068 876 713**

Quittie C. Wilson
Assistant Regional Commissioner
Processing Center Operations
Social Security Administration
Southeastern Program Service
P.O. Box 10728
Birmingham, AL 35202
**Return Receipt**
**# Z 068 876 255**

Dennise Smith
Assistant Regional Commissioner
Processing Center Operations
Social Security Administration
Western Program Service Center
P.O. Box 4061
Richmond, CA 94804
**Return Receipt**
**# Z 068 876 566**

**RE: Withdrawal of UMWA Combined Fund Beneficiaries Assigned to Jericol Mining, Inc., EIN 61-0844927**

Dear Madam:

Jericol Mining, Inc. ("Jericol") (EIN 61-00844927), requests that the Social Security Administration ("SSA") withdraw certain UMWA Combined Fund beneficiaries assigned to Jericol under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act" or the "Act").[1] Most of these assignments were based on the erroneous assumption that Jericol is "related"[2] to Shackleford Coal Company, Inc. (EIN 61-0606844) within the meaning of the Act. The beneficiaries assigned to Jericol because of its alleged "related" person connection to Shackleford are named on Exhibit 1. However, as demonstrated below, Jericol, is not "related" to Shackleford, and the Commissioner of SSA must therefore review the beneficiaries' records for reassignment. I.R.C. § 9706(f)(3).

**I. Factual Background**

The facts supporting this challenge are set forth below.

1. Blackwood Land Company and Penn Virginia Corporation separately own contiguous tracts of land, including coal reserves, (collectively known as "Glenbrook") located 31 miles east of the town of Harlan, in Harlan County, Kentucky. The Glenbrook tracts cover 3,300 acres of land. (Exhibit 2, pp. 2-3). Blackwood and Penn Virginia leased these properties ("the Glenbrook

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[1] 26 U.S.C. §§ 9701 et seq.

[2] *See* I.R.C. § 9701(c)(2) (related person test).



Leases") to Stonega Iron & Coke in the 1950s. Stonega assigned them to Shackleford in the mid 1960s. (Exhibit 7, p. 1).

2. In 1972, Henry Shackleford, Shackleford's then sixty-seven-year-old president and principal shareholder, and his sixty-five-year-old brother Byrd, wanted to retire so they put the company up for sale for $4.3 million. (Exhibit 2, pp. 1, 5-6, 10).

3. In late 1972, on behalf of Ray Resources Corporation, Charles and James Sigmon thoroughly investigated the company. (Exhibit 2, p. 1). They came to view it as a "very attractive acquisition" target, especially when the asking price dropped to $3.2 million. (Exhibit 2, at p. 10, 12).

4. In January 1973, James Sigmon presented a written report accompanied by a buy recommendation to Ray Resources Corporation, ("Ray") and the board of directors directed Ray's officers "to continue their negotiations concerning the possibility of the acquisition of the stock of Shackleford Coal Company. . . ." (Exhibit 3, at p. 6).

5. The Sigmon brothers were formally notified of the board's ultimate rejection of the proposed stock acquisition in late April. (Exhibit 4).

6. Charles and James Sigmon through their counsel, Bart Brown, subsequently formed a corporation, Irdell Mining, Inc. ("Irdell"). (Exhibit 5, p. 1 ¶ 3; Exhibit 6). Irdell acquired subleases to the Glenbrook Leases from Shackleford's assignees. (Exhibit 5, p. 1 ¶ 6; Exhibit 7). The subleases were subject to a reversionary interest

and Irdell's payment of per-ton royalties on all mined coal. (Exhibit 5, p. 1 ¶ 6; Exhibit 8, p. 1 ¶ 5).

7. Irdell did not acquire the stock of Shackleford. (Exhibit 5, p. 1 ¶ 6; Exhibit 14, p. 1 ¶ 6; Exhibit 8, p.1 ¶ 6).

8. Rather, Irdell bought Shackleford's operating assets, such as leasehold improvements, machinery, equipment and motor vehicles. (Exhibit 9; Exhibit 10, p. 1 ¶7).

9. The Sigmon brothers thought it might be helpful if they could operate for a while using the Shackleford name. (Exhibit 5, p. 1 ¶ 8). Shackleford's owners were not opposed to this. They agreed to change the name of their company to Kelley & Associates, Inc. ("Kelley & Associates") to free up the name Shackleford Coal Company. (Exhibit 10, p. 2 ¶ 9; Exhibit 11, Amended Articles of Incorporation and Shareholders' Consent). (The Kelley in Kelley & Associates referred to James Kelley, one of the original Shackleford owners. (Exhibit 10, p. 1 ¶ 8).

10. Irdell, in a fair market exchange, paid Kelley & Associates cash for the assets covered by the sale and then changed its name to Shackleford Coal Company. (Exhibit 12, Cashier's Checks; Exhibit 13, Amended Articles of Incorporation).

11. Kelley & Associates retained the distinct tax attributes of its statutory predecessor, Shackleford Coal Company, Inc. (Exhibit 14, p. 1 ¶ 7; Exhibit 8, p. 1 ¶ 8). Kelley & Associates ultimately liquidated and dissolved. (Exhibit 14, p. 1 ¶ 7; (Exhibit 10, p. 2 ¶ 10).



12. The new Shackleford Coal Company (formerly Irdell) commenced its operations at Glenbrook in June 1973. It subsequently signed the 1974 National Bituminous Coal Wage Agreement in connection with these operations, (Exhibit 15), and renamed itself Jericol Mining, Inc. in 1977. (Exhibit 16, Board Resolution and Amended Articles of Incorporation).

13. In 1996, SSA assigned to Jericol certain UMWA retirees, (Exhibit 1), who had retired from the Shackleford Coal Company created and owned by the Shackleford family. These beneficiaries never worked for the Shackleford Coal Company created and owned by the Sigmon family (and its statutory successor, Jericol).[3] These assignments were apparently based on SSA's determination that under section 9701(c)(2) of the Coal Act Jericol was "related" to the original Shackleford Coal Company, Inc.

## II. Analysis

### A. Who is a Related Person?

Jericol is not responsible for Coal Act premiums for the beneficiaries identified in Exhibit 1 because it never employed these miners, and is not "related," within the meaning of the Coal Act, to the company which did.

The Act provides four distinct tests for determining whether an entity is "related" to a signatory. I.R.C.

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[3] SSA also assigned certain UMWA retirees who went on to work for the Sigmon brothers' Shackleford Coal (or its statutory successor, Jericol) or who worked for these companies without ever working for the Shackleford brothers' Shackleford Coal. Jericol has separately challenged their assignment on other grounds.

§ 9701(c)(2)(A). An entity is "related" if it is (i) a member of a "controlled group" of corporations which includes the signatory, (ii) a business under "common control" with a signatory; (iii) a general partner or a joint venturer with a signatory; and (iv) a "successor in interest" to the related person. These tests are applied as of July 20, 1992.[4] If the signatory was not "in business" on this date, the test is applied as of the date immediately before the signatory ceased to be in business.[5] For purposes of this challenge, June 1973 may serve as the determination date for applying these tests.[6]

The related person tests are complicated. They are discussed only briefly below, because it is quite clear that Jericol was not a "related person" to Shackleford Coal Company, Inc. (renamed Kelley & Associates).

The "controlled group" related person test would be met here if Jericol had a parent-subsidiary,[7] a brother-

[4] I.R.C. § 9701(c)(2)(B).

[5] A company is "in business" if it "conducts or derives revenues from any business activity." I.R.C. § 9701(c)(7).

[6] It is unclear precisely when Shackleford Coal Compnay, Inc. (renamed Kelley & Associates) ceased to be in business. In any event, the company was likely out of business by the end of 1973. (Exhibit 14, p. 1 ¶ 7; Exhibit 10, p. 2 ¶ 10).

[7] The parent-subsidiary controlled group test is met where one or more chains of corporations is connected through stock ownership with a common parent corporation. 26 C.F.R. § 1.1563-1(a)(2). Chains of corporations linked by at least a 50% concentration of either share voting power or share value meet the test. I.R.C. § 9701(c)(2)(A)(i); I.R.C. § 52(a)(1); I.R.C. § 1563(a)(1)(A); 26 C.F.R. § 1.1563-1(a)(2)(i). Here, the test is not applicable, Shackleford Coal Company, Inc. (renamed Kelley & Associates) was never a wholly-owned subsidiary of Jericol or its statutory predecessors, (*i.e.*, Irdell and Shackleford Coal Company). Thus, the com-



sister,[8] or a combined group[9] relationship with Shackleford Coal Company, Inc. (renamed Kelley & Associates) on or about the date it ceased to be in business. I.R.C. § 9701(c)(2)(A)(i); I.R.C. § 52(a); I.R.C. § 1563(a); 26 C.F.R. § 1.1563-1(a)(1). This would have been in or after June 1973 when Shackleford Coal Company, Inc. ceased operating (or later if Kelley & Associates thereafter continued in business).

monality of ownership inquiry relating to parent-subsidiaries mandated by section 9701(c)(2) of the Coal Act need not be examined.

[8] The brother-sister prong of the controlled group test is met where the same five or fewer individuals (estates or trusts) who own a signatory operator also own a controlling interest in another entity. I.R.C. § 9701(c)(2)(A)(i); I.R.C. § 1563(a)(2); 26 C.F.R. § 1.1563-1(a)(3). This test imposes a more-than-50-percent identical ownership requirement and an 80 percent overall requirement. I.R.C. § 1563(a)(2); 26 C.F.R. § 1.1563-1(a)(3)(i). A person's stock ownership cannot be taken into account for purposes of the 80% brother-sister control requirement unless that person owns stock in each corporation of the brother-sister group. 26 C.F.R. § 1.1563-1(a)(3)(i)(b). The brother-sister prong of the controlled group test is not met here because, as noted, there is no common share ownership.

[9] The combined group prong of the controlled group test is met where there are at least three corporations each of which is a member of either a parent-subsidiary or a brother-sister controlled group and one of the corporations is the common parent of the parent-subsidiary controlled group and also is a member of a brother-sister controlled group. I.R.C. § 1563(a)(3); 26 C.F.R. § 1.1563-1(a)(4)(i). The combined group prong of the controlled group test is not met here because combined group status requires a finding of both brother-sister and parent-subsidiary control groups, which as noted, are not present here.

The new Shackleford Coal Company (formerly Irdell, now Jericol) was capitalized with 1000 shares of common stock held as follows:

| | Shares |
|---|---|
| James A. Sigmon | 510 |
| Charles E. Sigmon | 390 |
| Fred R. Langley | 100 |
| | 1000 |

(Exhibit 5, p. 1 ¶ 3; Exhibit 6, Subscriber Agreement; Exhibit 8, p. 2 ¶ 10). With the exception of Fred Langley's stake, which was purchased by James Sigmon in 1981, the shares of Jericol and its statutory predecessors (i.e., Irdell and Shackleford Coal Company) have at all times been held by Charles and James Sigmon and their family. (Exhibit 8, p. 2 ¶ 10).

By contrast, the original Shackleford Coal Company, Inc. (renamed Kelley & Associates) was capitalized with common stock held at all times as follows:

| Name | % of Shares |
|---|---|
| Henry Shackleford | 52.0 |
| Sam A. Shackleford and his wife Elva | 12.0 |
| Byrd L. Shackleford | 12.0 |
| Raymond E. Cole and his wife Reba K. Cole | 12.0 |
| James E. Kelley | 12.0 |

(Exhibit 14, p. 1 ¶ 3; Exhibit 10, p. 1 ¶ 6).

The controlled group test is not met because there has never been any common stock ownership. The



common control test[10] and the partnership or joint venture test[11] are *per se* inapplicable.

**B. Who is a Successor in Interest?**

1. Successor In Interest to a Related Person

Section 9701 of the Act sets forth generally applicable definitions. Section 9701(c)(2) defines the phrase "related persons." I.R.C. § 9701(c)(2). Subparagraph A of Section 9701(c)(2) identifies, in separate clauses, three peculiar relationships between a signatory operator and another entity (e.g., a joint venturer, general partner, individual, trade, business, or corporation).[12] I.R.C. § 9701(c)(2)(A)(i)-(iii). If the requisite relationship exists, the entity must be "considered to be a related person to a signatory operator." In addition, Section 9701(c)(2)(A) provides:

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[10] The common control test is an offshoot of the controlled group test. The requisite relationship is determined in accordance with the principles which apply to the controlled group test. The test is met if a trade or business is under common control with a signatory operator. I.R.C. § 9701(c)(2)(A)(ii); I.R.C. § 52(b). Jericol (and its statutory predecessors), and Shackleford Coal Company, Inc. (renamed Kelley & Associates) operated as corporations. Therefore, this test is not applicable.

[11] The partnership or joint venture test is met if a person is a joint venturer with a signatory operator or is a general partner in a signatory operation. I.R.C. § 9701(c)(2)(A)(iii). Neither Shackleford Coal Company, Inc. (renamed Kelley & Assoicates) nor Jericol (or its statutory predecessors) were partnerships or joint ventures. Therefore, this test does not apply.

[12] The "related person" definition concludes with a separate subparagraph, subparagraph B, which states the date for determining whether any of the relationships described in the three clauses exist. I.R.C. § 9701(c)(2)(B).

> A related person shall also include a **successor in interest** of any person described in clause (i), (ii), or (iii) [of Section 9701(c)(2)(A)].

I.R.C. § 9701(c)(2)(A) (emphasis added).

Thus, the "related person" definition includes a "successor in interest" of a "related person" (i.e., the "person described" in the preceding three clauses). Significantly, the plain language of the definition does not say that a "successor in interest" of a "signatory operator" is a "related person." In other words, a successor in interest to a member of Shackleford Coal Company, Inc.'s controlled group would be a related person to Shackleford under this definition, but a mere successor in interest to Shackleford is not a related person. Shackleford Coal Company, Inc. apparently had no other controlled group members, or "related persons", within the meaning of clauses (i), (ii), or (iii) of Section 9701(c)(2)(A). Jericol could not, therefore, be a successor in interest to Shackleford's nonexistent related persons. Moreover, under the definition, Jericol is not considered a related person to Shakleford, even if it would be considered a successor in interest to Shackleford.

2. Successor In Interest to a Signatory Operator

Assuming *arguendo*, that a "successor in interest" of a "signatory operator" is a "related person," Jericol still falls outside the definition. This is because Jericol does not meet the criteria for being a successor in interest to the Shackleford Coal Company created and owned by the Shackleford brothers.

The Act does not define "successor in interest". However, the term has been construed in an analogous



context. In two recent cases, the United States District Court for the Southern District of West Virginia concluded that "successor in interest" in the Coal Act has the same meaning as "successor in interest" in other parts of the Internal Revenue Code. *See UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, Civ. Action No. 5:96-0092, slip op. at 16 (S.D. W. Va. April 16, 1996) (attached as Exhibit 17). The court found that a "successor-in-interest" "means an acquiring corporation in a tax-free exchange in which the acquiring corporation succeeds to the tax attributes of a selling corporation." *Leckie Smokeless*, slip op. at 16. On appeal, these decisions were affirmed on other grounds.

Under, the *Leckie* analysis, Kelley & Associates, not Irdell (renamed Shackleford Coal Company), was the Coal Act "successor in interest." Irdell paid over $3 million to buy Shackleford's operating assets. (Exhibit 12, Cashier's Checks). The transaction was an asset purchase not a stock purchase.[13]

The buyer's "opening" balance sheet is dispositive on this point. The asset side of the ledger itemizes the operating assets the Sigmon brothers bought. The zero entered adjacent to the accumulated depreciation line confirms that the seller retained the depreciation charges it had previously taken against the operating

[13] The fact that Irdell obtained the legal right to the name "Shackleford Coal Company" when it was made available by virture of the original holder of the name switching to "Kelley & Assoicates, Inc." does not make Jericol a "successor in interest" to Shackleford Coal Company, Inc. Without regard to whether retaining a predecessor's name, hiring its employees and so forth may constitute some indicia of commercial or labor law successorship, this is not material to being a "successor in interest" within the meaning of the Coal Act.

assets. The liability side of the ledger establishes that the new company's liabilities consisted of debts incurred to pay for the assets and the 1,000 shares of stock issued to the Sigmon brothers and Fred R. Langley to capitalize the business. (Exhibit 18, Opening Balance Sheet). The balance sheet underscores that the Sigmon brothers' company did not succeed to Shackleford's tax attributes. (Exhibit 8, p. 1 ¶ 8; Exhibit 14, p. 1 ¶ 7).

Moreover, the seller's officers and shareholders have confirmed that after the sale Kelley & Associates retained and benefitted from its distinct tax attributes. The attributes are detailed on Shackleford's financial statements dated April 30, 1973. (Exhibit 19, Financial Statements). These included $1.8 million of business expenses and $1.9 million of accumulated depreciation. (Exhibit 19, Income Statement). Raymond Cole confirmed that he filed tax returns in 1973[14] on behalf of Kelley & Associates claiming deductions and recognizing income based on Shackleford's pre-sale attributes. (Exhibit 14, p. 1 ¶ 7). James Kelley confirmed that ultimately received a substantial cash distribution commensurate to his ownership share in Shackleford. (Exhibit 10, p. 2 ¶ 10).

Congress apparently did not think it necessary to define the commonly understood phrase "successor in

[14] All U.S. government instrumentalities are charged with cooperating fully with SSA in fulfilling its Coal Act assignment responsibilities. I.R.C. § 9706(d). Jericol asks that SSA rely on these powers to confirm with the IRS the evidence provided herein.



interest".[15] A successor in interest is ordinarily understood to refer to the entity that results from a change in form rather than a change in substance. The leading legal dictionary, defines the term as follows:

> In order to be a 'successor in interest,' a party must continue to retain the same rights as original owner **without change in ownership** and there must be change in form only and not in substance, and [a] transferee is not a 'successor in interest.'" In [the] case of corporations, the term ordinarily indicates statutory succession as, for instance, when [a] corporation changes its name but retains same property.

*Black's Law Dictionary* 1431-32 (6th ed. 1990) (emphasis added). (attached as Exhibit 21). Indeed, SSA's internal operations manual provides that the phrase "ordinarily indicates statutory succession." Transmittal No. 9 of the SSA's *Program Operations*

[15] Congress did use the more general term "successors" elsewhere in the Coal Act, but purposefully used the more restrictive term "successor in interest" in the "related person" definition. *See, e.g., Eastern Enterprises v. Shalala*, Civ. Action No. 93-12372, slip op. at 4 n.7 (D. Mass. March 30, 1996) (attached as Exhibit 20). Had Congress intended to afford "related person" status to commercial successors of signatory operators it would have done so by explicit language in subparagraph A of Section 9701(c)(2). As Judge Wolf stated with respect to the assignment provisions of the Coal Act:

> [T]he decision not to include successor in § 9706(a)(3) is rational. . . . . It imposes a duty on the pre-1978 signatory operator, which is likely to be most familiar with the unique facts of its situation, to collect from anyone who may have agreed to assume its liability or is otherwise obligated to do so.

*Eastern Enterprises*, slip op. at 4-5.

*Manual System* (SSA Pub. No. 68-0101402, January 1994) (defining "Successor (or Successors) In Interest" at Section T01402.051). (attached as Exhibit 22).

This interpretation finds further support in SSA's long-standing practice. SSA wage histories for miners who worked for the original Shackleford Coal Company, Inc. identify "Kelly & Associates, Inc." as Shackleford's "successor in interest".[16] (See, for example, the SSA wage history of Jack J. Farley a Round Three assignee). (Exhibit 23, p. 3). Employment during the period 1973-77, when the Sigmon's company was known as Shackleford Coal Company, is reflected in SSA's records as employment with Jericol and is listed under a different EIN and company address. (Exhibit 23, p. 3).

Jericol is unquestionably the statutory successor to Irdell and the Sigmon brothers' Shackleford Coal Company. As noted, in 1977, the Sigmon brothers formally amended the articles of incorporation of Shackleford Coal Company to rename the company Jericol Mining, Inc. (Exhibit 16, Amended Articles of Incorporation). Jericol retained all the rights, including tax attributes, of Shackleford Coal Company; there was no change in ownership. *See* 18 Am. Jur.2d *Corporations* § 93, at 910

[16] Jericol reserves the right to supplement this reconsideration request after it receives from your office and reviews information responsive to its Freedom of Information Act request dated June 19, 1996 concerning wage history references to "Kelly & Associattes" [sic], as the "successor in interest" to Shackleford Coal Company, Inc. (Exhibit 25). Jericol's counsel also reserves the right to supplement this reconsideration request after it receives from your office and reviews information responsive to a second FOIA request seeking access to these records dated January 10, 1997. (attached as Exhibit 26).



(1985) (amending charter to change corporate name has no effect on corporation's property, rights or liabilities). (attached as Exhibit 24). However, as noted, neither Jericol nor its statutory predecessors (*i.e.*, Irdell and Shackleford Coal Company) are "successor[s] in interest" or otherwise "related" to the original Shackleford Coal Company, Inc. which employed the miners in Exhibit 1.

**III. Conclusion**

As demonstrated above, two distinct families held distinct leasehold interests on identical parcels of Kentucky coal land at two distinct times. While it is true that the Shackleford family company and the Sigmon family company briefly shared the same name,[17] the companies are totally separate. There is no overlap in ownership between the two companies.

In sum, neither Jericol nor its statutory predecessors (i.e., Irdell and Shackleford Coal Company) is a "related person" to Shackleford Coal Company, Inc. (renamed Kelley & Associates) within the meaning of Section 9701(c)(2) of the Coal Act, because Jericol is not a

[17] We note that even a leading industry publication failed to discern the distinction between Shackleford Coal Company, Inc. owned by the Shackleford brothers through May 1973 and the Sigmon brothers' Shackleford Coal Company (June 1973 – November 1977). For instance, entries in the 1973, 1974 and 1975 *Keystone Coal Industry Manual* erroneously identify the Shackleford brothers, Henry and Byrd, as officers of the Sigmon's Shackleford Coal Company. (Exhibit 27). The error is glaring given that Henry Shackleford died in 1973, (Exhibit 5, p. 2 ¶ 11), and the Sigmons never hired Byrd Shackleford. Charles and James Sigmon are not identified as officers of their own company until the 1976 Keystone entry. (Exhibit 28).

"successor in interest". Jericol and its statutory predecessors satisfied none of the statutory relationship tests as of the June 1973 determination date. Thus, the assignments on Exhibit 1 must be withdrawn.

Jericol is making certain beneficiary-specific challenges by separate letter. The letter containing specific challenges relating to beneficiaries assigned by your office will be forwarded under separate cover.

Please contact us, should you have any further questions about this matter.

Sincerely,

/s/ JOHN R. WOODRUM
JOHN R. WOODRUM
W. Gregory Mott
Counsel for Jericol
Mining, Inc.

Enclosures
cc: Jerry Cooksey



**AFFIDAVIT OF R. WAYNE STRATTON**

I, R. Wayne Stratton, do hereby state under oath as follows:

1. My address is 642 South Fourth Ave., Suite 300, Louisville, KY 40202-9975. I have personal knowledge of the facts related in this Affidavit.

2. I am a certified public accountant and a member of the firm of Jones, Nale & Mattingly PLC.

3. During the past 25 years, I have provided a wide range of financial consulting, tax and accounting-related services to James A. Sigmon and Charles E. Sigmon in connection with their various businesses.

4. In this capacity, I have been involved in negotiating, structuring and concluding a number of transactions, including their transaction with the Shackleford family in May 1973.

5. In April 1973, I assisted the Sigmon brothers form Irdell Mining, Inc. In May 1973, I assisted Irdell acquire two subleases with respect to coal lands owned by the Penn Virginia Corporation and the Blackwood Land Company, properties which Shackleford Coal Company had leased until it assigned its leasehold interests to the subleasors. The subleasors retained a right of reversion in the properties and received a per-ton royalty payment from Irdell.

6. At the same time, I also assisted Irdell in purchasing the leasehold improvements and equipment of Shackleford Coal Company. We structured this transaction as an asset sale; no stock changed hands.

Shackleford received fair market value for the assets it sold.

7. Shortly after these transactions I obtained a tax identification number for Irdell, which had by this time had been renamed Shackleford Coal Company. This number is distinct from the one used to identify the old Shackleford Coal Company, which had been owned by the Shackleford family, and which had changed its name to Kelley & Associates, Inc.

8. I have coordinated, reviewed, and caused the filing of every federal and state income tax return of the Sigmon brothers' Shackleford Coal Company, and of the renamed corporation—Jericol Mining, Inc. At no time have any of these companies in any manner usurped the distinct income tax attributes retained by the Shackleford Coal Company (renamed Kelley & Associates), including its retained interest, dividends, or other income (including pension plan termination income), depreciation, miscellaneous deductions (including deductions for insurance officer and employee compensation, workers' compensation, regulatory expenses, Black Lung claims and legal expenses and accounting expenses incurred in the asset sale), depletion, net operating carryover losses or general business credit carryforwards.

9. In addition, there has never been any common ownership between Shackleford Coal (renamed Kelley & Associates) and Jericol (including its predecessors).

10. Irdell's stock was initially held as follows: James Sigmon (510 shares), Charles Sigmon (390) and Fred Langley (100). With the exception of Fred Langley's stake, which was purchased by James



Sigmon in 1981, the shares of Jericol and its predecessor, Shackleford Coal Company, have at all times been held by the Sigmon brothers and their family.

11. I believe Henry Shackleford owned the controlling interest (52%) of the Shackleford brothers' Shackleford Coal Company and Byrd, Sam and Elva Shackleford and James Kelley and Raymond Cole and his spouse held the remaining forty-eight percent (48%).

12. In summary, at different times the Shackleford brothers and the Sigmon brothers both owned a company bearing the same name; however these companies, as well as their predecessors and successors, had distinct tax attributes and separate ownership.

Further Affiant sayeth not.

/s/ R. WAYNE STRATTON
R. WAYNE STRATTON

**AFFIDAVIT OF JAMES E. KELLEY**

I, James E. Kelley, do hereby state under oath as follows:

1. My address is 2344 Wax Avenue, Big Stone Gap, VA 24219. I have personal knowledge of the facts related in this Affidavit.

2. I was a close friend of Henry Shackleford as well as his brothers, Sam and Byrd. I was involved in every business venture Henry undertook from the day we stopped working for Consolidated Coal in 1948 until Henry's death in 1973. These ventures included Closplint Coal Company, which operated around Crummies, Kentucky during the 1950s and early 1960s and Shackleford Coal Company, Inc., which mined near Holmes Mill, Kentucky from 1963 until the spring of 1973.

3. At no time did any of these ventures have any connection whatsoever with a company called Nashville Coal, Inc. Nor do I recall Henry's brothers having any additional ventures.

4. I was Secretary of Shackleford Coal Company. My responsibilities also included serving as the company's office manager and purchasing agent. During the time it operated Shackleford Coal Company was the only nonmechanized mine in the area. We employed more than two hundred miners under a special contract with the union.

5. I owned 12% of the company.



6. The rest of the company was always owned as follows:

| Name | Share % |
|---|---|
| Henry Shackleford | 52.0 |
| Sam & Elva Shackleford | 12.0 |
| Byrd Shackleford | 12.0 |
| Raymond & Reba Cole | 12.0 |

7. As Secretary I had a substantial role in concluding the sale of Shackleford assets to Charles and James Sigmon in the spring of 1973. I prepared and signed a number of sale documents including the Bill of Sale between Shackleford and Irdell Mining, Inc., which was the name of the Sigmon brothers' Company at that time.

8. In addition, on May 31, 1973, Byrd Shackleford and I signed an Amendment to the Shackleford Coal's Articles of Incorporation and I swore as to its accuracy before Raymond Cole. Raymond Cole was a notary and the company's Controller. The amendment certified that the board of directors had met the day before and unanimously resolved to change the name of the company to Kelley & Associates, Inc. The new name was Raymond Cole's idea. The Kelley in Kelley & Associates refers to me.

9. We changed our company's name because the Sigmon brothers were strangers to the area. They wanted to continue using the Shackleford Coal name because it was well known to everyone in the area, and they felt using the Shackleford name would make it easier for them to establish themselves in the area.

10. Kelley & Associates remained a viable company for a while. It eventually wound down and dissolved. To the best of my recollection, I cashed in my 12% stake and I had to pay some $80,000 in long-term capital gains.

11. After the sale, the Sigmon brothers hired me to serve as vice president of their company (formerly Irdell Mining), which they had renamed Shackleford Coal. After the Sigmon family acquired Shackleford Coal Company's assets and established a toe hold in the area, they promptly moved to invest substantial capital in mine development and new technology. The Sigmon's hired me because they figured I could work with the union just like I had done for Shackleford. I later signed the 1974 NBCWA on behalf of the Shackleford Coal Company, which was then owned by the Sigmon family.

12. I served as vice president of the new Shackleford Coal Company until I resigned in December 1975. Thereafter, I went into public service and later became the mayor of Big Stone Gap, Virginia.

13. I never owned any stock in the Sigmon brother's Shackleford Coal. To my knowledge, the only shareholders were Fred Langley and the Sigmon brothers.



Further Affiant sayeth not.

/s/ JAMES E. KELLEY
JAMES E. KELLEY

**AFFIDAVIT OF RAYMOND E. COLE**

I, Raymond E. Cole, do hereby state under oath as follows:

1. My address is 8001 Greenhurst Court, Louisville, KY 40299. I have personal knowledge of the facts related in this Affidavit.

2. I am a retired certified public accountant. I was formerly a shareholder of Shackleford Coal Company, Inc. and the company's controller and assistant secretary-treasurer. In this capacity, I prepared and filed the company's income tax returns and provided other tax accounting-related services to the business.

3. This company was owned as follows: Henry Shackleford and/or his family members owned 52 percent. Sam Shackleford, Byrd Shackleford, James E. Kelley and Raymond Cole and/or their family members owned the other 48 percent.

4. At no time did any member of the Sigmon family own any stake in this company.

5. I was involved in negotiating and concluding a deal with the Sigmon brothers through their company, Irdell Mining, Inc. An agreement was reached between the shareholders of Shackleford Coal Co., Inc. and the Sigmon brothers in the latter part of 1972 and a statement of intent was signed in December of 1972. The transaction was concluded in early 1973.

6. This transaction was an asset purchase. The Shacklefords would have readily agreed to a stock



purchase, Irdell, however, made it clear that it did not want a stock purchase.

7. Shackleford Coal Company, Inc. was renamed Kelley & Associates, Inc. I prepared and filed 1973 Federal and Kentucky income tax returns for Kelley & Associates which included all of the information concerning the sale of Irdell Mining, Inc. that was required to be included on these returns. I do not recall having any discussions or being concerned with the retention or transfer of tax attributes. Shackleford Coal Co., Inc. did not have any capital loss or net operating loss carryovers. My concern with the sale to Irdell Mining, Inc. was primarily if not solely limited to the accounting and income tax consequences to the shareholders of Shackleford Coal Co., Inc. All other matters were handled by the attorneys.

8. Thereafter, I did some accounting work for the Sigmon brothers for about a year as an outside independent accountant.

Further Affiant sayeth not.

/s/ RAYMOND E. COLE
RAYMOND E. COLE

# SHACKLEFORD COAL COMPANY, INC.

## FINANCIAL STATEMENTS

## APRIL 30, 1973

PREPARED WITHOUT AUDIT
FOR MANAGEMENT PURPOSES ONLY

...ACKLEFORD COAL COMPANY, INC.
INCOME STATEMENT

PREPARED WITHOUT AU[redacted]
FOR MANAGEMENT PURPOSES ONLY

| | April 1973 | | Year To Date | |
|---|---|---|---|---|
| Tons NOTE 1 | 21,772 | | 168,921 | |
| | Per Ton | Amount | Per Ton | Amount |
| **Coal Sales:** | | | | |
| Railroad | | 243,238.96 | | 2,155,311.33 |
| Retail | | 8,082.04 | | 126,643.88 |
| Inventory Change | | 22,662.21 | | 48,276.16 |
| Total | 12.5842 | 273,983.21 | 12.3344 | 2,330,231.37 |
| Ky. Severance Tax | .3000 | 6,538.00 | .3000 | 56,680.50 |
| Net Sales | 12.2842 | 267,445.21 | 12.0344 | 2,273,550.87 |
| **Operating Expense:** | | | | |
| Selling Expense | .5093 | 11,088.48 | .4777 | 90,249.19 |
| Association Dues | .0227 | 494.38 | .0257 | 4,755.05 |
| Electric Power | .2898 | 6,308.80 | .2626 | 49,617.40 |
| Insurance - W. C. | .6280 | 13,672.32 | .4843 | 91,496.93 |
| Insurance - Other | .0479 | 1,043.35 | .0376 | 7,096.30 |
| Interest Expense | .0230 | 500.00 | .0185 | 3,500.00 |
| Legal and Professional | -- | -0- | .0247 | 4,655.00 |
| Labor - Mine | | ( 66,317.14 | | ( 663,057.47 |
| Labor - Tipple | 3.6047 | ( 12,163.87 | 4.0917 | ( 109,958.92 |
| Miscl. Expense | .0037 | 82.45 | .0031 | 589.23 |
| Office Expense | -- | 10.50 | .0042 | 788.70 |
| Mineral Royalty | .1501 | 3,268.88 | .1500 | 28,340.00 |
| Rent | -- | -0- | .0440 | 8,320.53 |
| Salaries - Office & Admr. | .7323 | 15,944.40 | .5912 | 111,683.72 |
| Mine Supplies | 1.4200 | 30,917.06 | 1.6968 | 320,565.71 |
| Spray Oil | -- | -0- | .0047 | 893.46 |
| Taxes - Payroll | .2665 | 5,801.30 | .2114 | 39,942.27 |
| Taxes - Property & Miscl. | .0735 | 1,600.18 | .0655 | 12,374.66 |
| Timbers | .0244 | 531.00 | .0875 | 16,546.94 |
| Telephone | .0065 | 142.20 | .0060 | 1,142.12 |
| Truck and Auto | .0170 | 369.45 | .0137 | 2,597.61 |
| Welfare Royalty | .6506 | 14,165.16 | .6398 | 120,874.06 |
| Vac. & Holiday Pay | .2848 | 6,200.00 | .2542 | 48,028.53 |
| Hauling Refuse | .0952 | 2,072.38 | .1025 | 19,359.88 |
| Hauling Coal | .1399 | 3,045.00 | .1213 | 22,915.21 |
| Roads | .0717 | 1,560.94 | .0619 | 11,697.66 |
| Travel Expense | -- | -0- | .0012 | 234.78 |
| Employee Benefits | .0023 | 50.00 | .0077 | 1,462.00 |
| Wheelage REnt | .0051 | 111.16 | .0008 | 150.00 |
| Other | -- | -0- | (.0206) | (3,889.16) |
| Total Expense | 9.0695 | 197,460.40 | 9.4696 | 1,789,004.17 |
| **Income Before Depreciation** | 3.2147 | 69,984.81 | 2.5648 | 484,546.70 |
| Estimated Depreciation | 1.1483 | 25,000.00 | .9263 | 175,000.00 |
| **Income Before Income Tax** | 2.0664 | 44,984.81 | 1.6385 | 309,546.70 |

NOTE 1 - RAILROAD CAR SHORTAGE, WORKED 12 DAYS OUT OF 21 DAYS AVAILABLE



BEST AVAILABLE COPY

SHACKLEFORD COAL COMPANY, INC.
BALANCE SHEET
APRIL 30, 1973

PREPARED WITHOUT AUDIT
FOR MANAGEMENT PURPOSES ONLY

| | | | |
|---|---|---|---|
| **ASSETS** | | | |
| **Current Assets:** | | | |
| Cash In Banks | | 295,013.32 | |
| Account Receivable - General Coal Co. | | 232,150.48 | |
| C.S.V. Life Insurance | | 48,365.90 | |
| Deposits | | 25,565.00 | |
| Coal Inventory - In Transit | | 131,291.70 | |
| Coal Inventory - Stock | | 7,000.00 | |
| | | | 739,386.40 |
| **Depreciable Assets:** | | | |
| Property, Plant and Equipment | | 4,655,303.84 | |
| Accumulated Deprec. to Beg. of Year | | (1,921,189.55) | |
| Estimated Deprec. - Year To Date | | (175,000.00) | |
| | | | 2,559,114.29 |
| **Other Assets:** | | | |
| Prepaid Expense | | | 14,695.57 |
| TOTAL ASSETS | | | 3,313,196.26 |
| **LIABILITIES** | | | |
| **Current Liabilities:** | | | |
| Accounts Payable | | 69,790.84 | |
| Notes Payable | | 100,500.00 | |
| Accrued Payroll | | 27,413.97 | |
| Accrued Payroll Taxes | | 15,311.84 | |
| Accrued Property Taxes | | 13,289.92 | |
| Accrued Kentucky Severance Taxes | | 6,538.50 | |
| Accrued Vacation & Holiday Pay | | 61,000.00 | |
| Accrued Income Taxes | 77,000.00 | | |
| Less Prepayments | 54,945.00 | 22,055.00 | |
| | | | 315,900.07 |
| **Shareholders' Equity:** | | | |
| Capital Stock Issued | | 31,000.00 | |
| Retained Earnings, Beg. of Yr. | 2,733,749.49 | | |
| Income, Year to Date | 309,546.70 | | |
| Provision for Income Taxes | (77,000.00) | 2,966,296.19 | |
| | | | 2,997,296.19 |
| TOTAL LIABILITIES | | | 3,313,196.26 |

AREA CODE 606
TELEPHONE 837-2840

**SHACKLEFORD COAL COMPANY**

INCORPORATED

HOLMES MILL, KENTUCKY 40843

July 10, 1973

Mr. Bart A. Brown, Jr.
Dinsmore, Shohl, Coates & Deupree
2100 Fountain Square Plaza
Cincinnati, Ohio 45202

Dear Bart:

Per your request I enclose an opening Balance Sheet for Shackleford Coal Company as of June 1, 1973. This Balance Sheet is immediately after the completion of the purchase of the physical assets and leaseholds and the borrowings from the First National Bank of Cincinnati and Mr. James Sigmon.

This is an unaudited balance sheet prepared by me as controller of Shackleford Coal Company; no independent accountant's opinion is being supplied or intended.

Yours very truly,

/s/ RAYMOND COLE
RAYMOND COLE

RC:pf

Enclosures

Copy to: Mr. Willis C. Nale
Mr. James A. Sigmon
Mr. Charles E. Sigmon
Mr. Rolf Brookes

SHACKLEFORD COAL COMPANY
UNAUDITED BALANCE SHEET
JUNE 1, 1973

## ASSETS

| | | |
|---|---|---|
| **Current Assets:** | | |
| Cash in Bank, First National, Cincinnati | 352,126.84 | |
| Inventory (Coal In Storage) | 83,456.00 | |
| Inventory (Mine Supplies) | 118,990.00 | |
| Total Current Assets | | 554,572.84 |
| **Depreciable Assets:** (Acquired 6/1/73) | | |
| Coal Preparation Plant | 1,035,779.69 | |
| Buildings and Houses | 128,027.82 | |
| Mining Equipment | 1,093,124.66 | |
| Rolling Equipment | 73,541.46 | |
| Office Equipment | 16,771.42 | |
| Other Equipment | 98,182.11 | |
| Total | 2,445,427.16 | |
| Less Accumulated Depreciation Charges | -0- | |
| Book Value | | 2,445,427.16 |
| **Other Assets:** | | |
| Coal Mine Leasehold (Note 1) | | -0- |
| **TOTAL ASSETS** | | 3,000,000.00 |

## LIABILITIES AND CAPITAL

| | | |
|---|---|---|
| **Current Liabilities:** | | |
| Mortgage Note Payable, First National Bank, Cincinnati Principal Payments of $100,000 Due December 31, 1973 and March 31, 1974 | | 200,000.00 |
| **Long-Term Liabilities:** | | |
| Mortgage Note Payable, First National Bank, Cincinnati | 2,000,000.00 | |
| Less Current Portion | (200,000.00) | |
| Balance Payable $100,000 Quarterly Beginning June 30, 1974 | 1,800,000.00 | |
| Mortgage Note Payable, James Sigmon, Due May 31, 1978 | 500,000.00 | |
| | | 2,300,000.00 |
| **Shareholders' Equity:** | | |
| Capital Stock Authorized 1,000 Shares No Par Value Common Stock. Issued and Outstanding, 1,000 Shares | | 500,000.00 |
| **TOTAL LIABILITIES AND CAPITAL** | | 3,000,000.00 |

See notes to Balance Sheet attached.
Unaudited - See letter attached.

SHACKLEFORD COAL COMPANY
NOTES TO UNAUDITED BALANCE SHEET
JUNE 1, 1973

Note 1

The Company is obligated under coal mine leases from the Penn Virginia Corporation and the Blackwood Land Company assigned to the Dale Company, Pineville, Kentucky and subleased to Shackleford Coal Company to mine certain coal seams to normal exhaustion of all coal on approximately 3,000 acres of land in Harlan County, Kentucky. Royalty is 10% of the gross selling price of coal or approximately $1.25 per ton. Minimum annual royalty is $18,000.00 per year on each leasehold.

Note 2

The Company is obligated under a purchase commitment to the FMC Corporation, Fairmont, West Virginia for two (2) Galis Shuttle cars in amount of $78,309.05.

RAY RESOURCES CORPORATION
630 Commerce Square
CHARLESTON, WEST VIRGINIA 25301

PLEASE ADDRESS YOUR REPLY TO
3 East 54th Street
New York, New York
10021

April 26, 1973

Messrs. James and Charles Sigmon
Middlesboro, Kentucky

Dear James and Charles:

Pursuant to the authorization of the Board of Directors at the meeting held on April 12, 1973, the Executive Committee has given further consideration to the possibility of Ray Resources Corporation acquiring Shackleford Coal Company of Harlan County, Kentucky.

As a result of such further consideration, Ray Resources Corporation has concluded that the company would not be interested in acquiring any interest in this company or its assets.

Yours Sincerely,

REEVES LEWENTHAL
REEVES LEWENTHAL

RL:lal



**SHACKLEFORD COAL COMPANY**

We have been investigating a number of possibilities for acquisition of operating coal properties. We considered the most promising of these to be Shackleford Coal Company, Harlan County, Kentucky, and have, therefore, concentrated our recent efforts on it.

These efforts included a physical inspection of their properties, including visits to their operating mines, their washer and preparation plant and the seams of coal they are not presently mining; review of their mine maps; and a review of their relevant financial data.

Following this review, we met with Henry Shackleford, President and principal shareholder of the Company, and Raymond Cole, Secretary-Treasurer and a shareholder of the Company, on January 5, 1973, to negotiate terms under which the Company might be acquired.

Following extensive discussions and negotiations, we agreed that a fair price for all the stock of the Company based on its December 31, 1972 situation would be $3,230,000. This price would be increased by earnings of the Company from December 31, 1972 to the date of closing or decreased by any losses for this period. A summary of the essential terms under which the Company can be acquired is attached hereto as Exhibit A. A target date for closing is March 1, 1973.

As described in detail hereinafter, we believe this to be an excellent acquisition at this price. We strongly recommend that you authorize us to pursue this matter and work out a definitive Purchase Agreement to be submitted to this Board for its consideration.

To realize the full potential from an acquisition of the Shackleford Coal Company, additional capital expenditures amounting to approximately $1,500,000 must be incurred. By making these expenditures, the production of Shackleford can be roughly doubled and the profits of the Company can be more than doubled. Thus, we believe that this Board should consider this as an approximately $4,800,000 acquisition. In connection therewith, we recommend that the Board consider now where the funds to make this acquisition will be obtained so that the necessary funds will be available by March 1, 1973.

A summary of relevant information as to Shackleford Coal Company is as follows:

The Shackleford Coal Company operates the Glen Brooke mines which are located approximately 31 miles east of Harlan, Kentucky, in Harlan County. The properties being mined are covered by two separate leases covering contiguous properties as follows:

(1) The Blackwood Lease covers an approximately 1,909 acre tract and permits the mining to exhaustion of all seams of coal located on this property. The principal seams are the High Splint, Middle Splint, Low Splint, Creech and Darby. Other seams are located on this property but they have not been mined or prospected. The royalty rate is 15 cents per ton, but there is some possibility [illegible] would be to lock in the 15 cents per ton royalty rate.

(2) The Penn Virginia Lease covers an approximately 1,257 acre tract and permits the mining to exhaustion of only the High Splint seam. It is unlikely that a lease of the other seams could be



obtained. The royalty with respect to this property is 15 cents per ton and is not subject to change.

Shackleford is presently mining the High Splint and Low Splint seams located on these properties. This coal is an extremely high-quality metallurgical coking coal. With washing, the BTU content will run 13,200 to 13,500, the ash content is less than 6 percent and the sulphur content averages .62 percent. The coal in the High Splint seam runs approximately six feet in thickness and we estimate the recoverable reserves from this seam at approximately 12,000,000 tons. The coal in the Low Splint seam runs seven to nine feet in thickness with two small partings and we estimate the recoverable tonnage at between 6,000,000 and 7,000,000 tons. Consequently, recoverable reserves from just these two seams would amount to approximately 18,000,000 tons.

The mining operations in these two seams consist of two mines located in the High Splint seam and one mine located in the Low Splint seam. All of these mines have excellent mining conditions and are well-laid out, well-developed mining operations. There is good compliance with the mine safety rules. The equipment is in excellent shape and is well maintained. Some of the miners are now three to four years old and production could be materially increased by exchanging these miners for the latest mining equipment. If this were done, the new equipment would more than pay for itself within a very short period of time through increased production. Moreover, the capacity of two of these mines could be more than doubled by putting a new mining unit in each mine. The cost of each new complete mining unit would run approximately $400,000

and, again, more than pay for itself through increased production within a very short period of time.

We also inspected the washer and preparation facilities and found them to be well built and well maintained. The Company is presently running only a single shift at the washer and preparation plant and processing approximately 330,000 tons of clean coal per year. With some minor changes in the conveyor system, we believe this tonnage could be increased to approximately 400,000 tons for a single shift and to as much as 800,000 tons per year by going to a double shift. Moreover, the labor force used to operate this washing plant can be reduced somewhat with certain mechanical changes. The Company has no water or waste pollution problem.

Other equipment and facilities of the Company are well maintained and in excellent condition. They have sufficient equipment on hand to put in any desired new mines, roads, etc.

In addition to the High Splint and Low Splint seams that are presently being mined, the Middle Splint, Creech and Darby seams on the Blackwood property represent very substantial future mining opportunities.

The Middle Splint seam is approximately 50 inches in height; the coal has essentially the same characteristics as the coal from the High Splint and Low Splint seams; and the mining conditions are excellent. This seam should probably be mined along with the Low Splint, as it is located only about 30 to 35 feet above the Low Splint seam. If we acquired this property, we would want to have a mine consulting firm review this seam and the Low Splint seam and then advise us as to the means by which the maximum tonnage could be



produced from both seams. Then, working with the land owner, we could jointly develop a program for mining both seams.

The Creech seam is about five feet in height and has two small partings. Consequently, this coal would have to be washed. The quality of this coal is not as high as the other seams located on this property but, with blending, could possibly be sold as metallurgical coal or would at least be saleable as a high-quality steam coal. Mining operations in connection with this seam are excellent and a tremendous tonnage could be mined from this seam at a relatively low cost per ton.

The Darby seam is approximately 50 inches in height and is the highest quality coal on this property. It represents the largest undeveloped area of Darby seam coal in all of Harlan County. This coal has a BTU content of more than 14,000; ash of less than 3 percent; and a sulphur content of less than .6 percent. Unfortunately, mining conditions for this seam are quite poor. Because of the poor mining conditions, we would not recommend that this seam be mined at this time. However, one of these days, this seam will be mineable at a very substantial profit.

Management of this Company consists of four Shacklefords. Henry and Byrd Shackleford are 67 and 65 years of age, respectively, and want to retire. Both, however, would agree to be available on a consulting basis. Sam Shackleford is 54 years of age and is general mining superintendent. Tom Shackleford is approximately 43 years of age and supervises the operations of the preparation plant and loading operations. Both Sam and Tom Shackleford will stay on to continue the day-to-day mining operations.

For years, the Shacklefords have run only a United Mine Workers operation. However, the entire labor force has been carefully screened and represents an extremely loyal group of employees. The over-all quality of the Company's labor force is much higher than the usual UMW labor force. With Tom and Sam Shackleford staying on, we believe the same high-quality labor force can be maintained. Supervisory personnel are loyal and highly competent. All of the supervisory personnel would stay on.

Since 1970, more than 90 percent of the coal mined from this property has been sold to United States Steel. The price today is $11.99 per ton and, after January 1, 1973, will be increased to cover increased workmen compensation costs.

United States Steel is willing to take as much coal from this property as can be produced. Thus, there is a waiting market for any increased production. If production could be roughly doubled, freight costs could be decreased $1.00 to $1.25 per ton which would likely increase the price United States Steel would be willing to pay for the coal. Finally, based on present market conditions, the price to United States Steel for this quality coal is somewhat low. Consequently, a price increase is possible, particularly if the freight cost could be decreased.



## Financial Data

### Balance Sheet Analysis

The Company uses a September 30 fiscal year. Its balance sheet as of September 30, 1972 reflects the following:

| | |
|---|---|
| Current Assets | $ 616,780 |
| Fixed Assets | 4,392,250 |
| Less: Accumulated Depreciation | (1,921,189 |
| Total Assets | $ 3,087,841 |
| Current Liabilities | $ 323,092 |
| Net Worth | 2,764,749 |
| | $ 3,087,841 |

Book value of fixed assets reflect straight-line depreciation except for assets acquired in fiscal 1972 where accelerated depreciation was used. The use of accelerated depreciation resulted in a decrease of book value of the assets acquired in fiscal 1972 by some $28,000 more than would have resulted had straight-line depreciation been used.

Also, the balance sheet reflects no supplies inventory. The accountant estimates that mine supplies now on hand amount to more than $100,000. In our opinion and based on our inspection of the mines, this estimate is probably conservative.

In addition, the Company has followed the same practice that we followed of expensing all mine development costs. Thus, none of these costs are reflected on its balance sheet.

Taking into account book value at September 30, 1972, earnings for the last three months of 1972, the excess depreciation over straight-line depreciation, a true supplies inventory and the true unamortized mine development costs, the purchase price is undoubtedly something less than what a true book value would be.

## Profit and Loss Analysis

In its fiscal year ended September 30, 1970, the Company began the development of its relationship with United States Steel. By the end of this fiscal year, substantially all its production was being sold to United States Steel. With United States Steel being virtually its solo customer for only fiscal 1971 and 1972, we believe its operating results for these years are of primary importance and its operating results for other years should be disregarded.

The Company's operations for these years can be summarized as follows:



| | Year Ended September 30 | |
|---|---|---|
| | 1971 | 1972 |
| Tonnage Sold | 316, 386 | 327,940 |
| Sales | $ 3,456,879 | $ 3,766,309 |
| Less: Cost of Sales | (2,273,480) | (2,625,175) |
| Depreciation | (225,124) | (319,022) |
| Selling & Other Costs | (279,236) | (322,303) |
| Interest | (16,271) | -- |
| Income From Coal Operations | $ 662,768 | $ 499,748 |
| Other Income | 13,761 | $ 19,706 |
| Income Before Income Tax | $ 676,529 | $ 519,456 |
| Income Taxes | (129,431) | (109,451) |
| After-Tax Profit | $547,098 | [illegible] |

On a per ton basis, operations for these years reflect the following:

| | Year Ended September 30 | |
|---|---|---|
| | 1971 | 1972 |
| Sales | $10.93 | $11.48 |
| Less: Cost of Sales | (7.19) | (8.00) |
| Depreciation | ( .71) | ( .97) |
| Selling & Other Costs | (.88) | ( .98) |
| Interest | (.05) | – |
| Income From Coal Operations | $ 2.10 | $ 1.53 |

Expenses for fiscal 1971 and 1972 include $33,000 per year in rent which is paid to a related partnership for rental of some mining equipment. The after-tax profit therefrom amounted to about $20,000 per year. These partnership assets are to be included in the deal. Consequently, considering both the Company and the partnership, earnings for fiscal 1971 and 1972 amounted to about $567,000 and $430,000, respectively, or an average of about $500,000 per year in after-tax earnings.

In connection with these profits, it is to be noted that, in fiscal 1972, the UMW went on strike for approximately 50 days. Therefore, the profit for this year represents only a ten-month operation. Also, for fiscal 1972, the Company thought it had a substantial problem because of its price freeze situation. As a result, the Company held down production and attempted to increase its costs to the maximum extent possible. This accounts for the tremendous build-up of supplies that was previously mentioned. (In this connection, the Company has now determined that its profit margins for the base period years were high enough to cover its price increases through 1972. However, if we acquire Shackleford and their profits are combined with those of Ray and Coal Resources, the average profit margins are such that the Company could continue to increase its prices substantially without any price freeze problem.)

The original asking price for the Company was $4,300,000 which, as previously mentioned, has been reduced to $3,230,000. Based on average after-tax earnings of $500,000, this price represents slightly less than 6 1/2 times earnings. Taking into account average depreciation for those two years of about $275,000, this



price would be recovered through earnings and depreciation in about 4.2 years.

However, as previously mentioned, the real value of these properties is in the potential for substantially increased production. Thus, if these properties are acquired, we would want to add approximately $1,500,000 in capital improvements to these properties ($800,000 to add two complete new mining units to the present mines; $400,000 for the newest model miners in existing mines; and $300,000 for belt feeders, haulage equipment and miscellaneous capital additions). With these capital improvements, we would anticipate a minimum annual production of 800,000 tons.

Because of the delivery time needed for this new equipment, we would anticipate that it would be towards the end of 1973 before we could get production to the annual level of 800,000 tons. Assuming a March 1 completion date for this acquisition, we would anticipate production in the area of 500,000 tons for 1973. Beginning with 1974, the level of 800,000 tons or more could be attained.

Following our acquisition of these properties, we believe that a conservative profit per ton before our 10 percent bonus would be $1.75 per ton. For 1974, in which the level of 800,000 tons of production can be reached and using a profit of $1.75 per ton, we believe the following results are conservative but reasonable:

| | Profit & Loss Statement | Cash Flow |
|---|---|---|
| Profit of $1.75 per ton x 800,000 tons | $1,400,000 | $ 1,400,000 |
| Less: 10% Bonus to Sigmons | (140,000) | (140,000) |
| Before-Tax Profit | 1,260,000 | 1,260,000 |
| Income Taxes at 26% | (327,600) | (327,600) |
| Net Profit After Taxes | $ 932,400 | $ 932,400 |
| Depreciation (estimated) | | 500,000 |
| Cash Flow After Taxes & Interest Cost | | $ 1,432,400 |

Thus, we believe that, by 1974, these properties would provide Ray with a profit representing a 19.4 percent on its investment of $4,800,000 and a recovery of this cost through earnings and depreciation in less than 3 1/2 years.

In connection with the estimate of the per ton profit at $1.75 per ton, Shackleford estimates its per ton profit for 1973 at $1.8182 based on production of 330,000 tons and at $2.2917 based on production of 360,000 tons. See, in this regard, Exhibit B attached. This, of course, reinforces our belief that a per ton profit of $1.75 is very conservative.

As you can see from this report, we are very impressed with the Shackleford coal properties. This is one of the finest blocks of coal in Harlan County. We think that, with Sam and Tom Shackleford staying on, continuity of management and the excellent relations that the Company has with its employees can be maintained. The one problem that has concerned us is



our ability to run a union operation with Shackleford Coal Company and a non-union operation at Coal Resources. Knowing, however, the people involved and through the use of separate corporations, we believe this separation can be maintained. Finally, we believe the asking price has been reduced to a point where this is a very attractive acquisition in the light of the profits it will generate.

James A. Sigmon
Charles E. Sigmon

**EXHIBIT A**

UNDERSTANDING
WITH
SHACKLEFORD COAL COMPANY

(1) Prior to the closing, Glenbrook Equipment Company will sell to Shackleford Coal Company its equipment at its then book value.

(2) At the closing, the shareholders of Shackleford Coal Company will sell to Ray Resources Corporation and Ray will purchase from these shareholders all the outstanding stock of Shackleford Coal Company. The price for this stock will be $3,230,000 plus the after-tax profits of Shackleford Coal from December 31, 1972 to the date of closing or minus the after-tax losses of Shackleford Coal for this same period. Profits or losses after December 31, 1972 will be calculated in the same manner and using the same accounting principles as Shackleford Coal Company is now using. This entire purchase price will be paid in cash at the closing.

(3) Conditions to closing will be as follows:

(a) Westmoreland will relinquish its right of first refusal;

(b) Ray can obtain an engineering study certifying to proved reserves of at least 8,500,000 tons of coal and probable reserves of at least 15,000,000 tons of coal from the Shackleford properties;



(c) Shackleford's counsel will furnish to Ray his opinion as to title to the Shackleford leaseholds that will enable Ray to obtain title insurance on the properties at usual premium rates;

(d) Shackleford and its key employees (Sam Shackleford, Raymond Cole and perhaps others) will enter into three-year management contracts mutually acceptable;

(e) Henry and Byrd Shackleford will enter into Agreements Not to Compete with Shackleford mutually acceptable;

(f) Ray is satisfied as to the royalty arrangement with Blackwood Land Company. In this connection, Ray and its representatives will not discuss this matter with Blackwood or any other third parties without the expressed consent of Shackleford Coal Company; and

(g) Shareholders of Shackleford will warrant Balance Sheet of Shackleford as of December 31, 1972. They will reimburse Ray for any undisclosed liabilities (including taxes other than arising out of "roll-over" adjustments) exceeding $25,000. The December 31, 1972 Balance Sheet of Shackleford Coal will be prepared in the same manner and using the same accounting principles as Shackleford Coal used in the preparation of its September 30, 1972 Balance Sheet.

(4) Pending closing, Shackleford Coal will be operated in the usual manner and in accordance with

its regular business practices. No raises to employees or dividend payments will be made pending closing. Shackleford Coal will not make any commitments (other than for items it has already agreed to purchase) without the written consent of Ray pending the closing. Also, pending the closing, Shackleford Coal will give Ray and its agents access to any and all information concerning its affairs as Ray and its agents may reasonably request.

(5) Final arrangement is subject to definitive agreement containing usual warranties being worked out and properly executed and agreement of Ray's Board of Directors.

(6) Target date for closing is March 1, 1973.



TRANSMITTAL No. 9
SSA Pub. No. 68-0101402
January 1994

Audience:
NEPSC, SEPSC, GLPSC,
WNPSC—CA, CATA, BA,
PETE, CIES, RCOVTA,
RECOVR, RECONR
OCRO—DCCRC, DCCAIC,
DCCERC, DCCPA,
DEAPA, OSSPA,

Originating Office: ORSI

PROGRAM OPERATIONS MANUAL SYSTEM
Part 01 -- Records Maintenance
Chapter 014 -- Furnishing Earnings Information
Subchapter 02 -- General Information Regarding Furnishing Earnings Record Information Under Agreements

| New Material | No. of Pages | Discard | No. of Pages |
|---|---|---|---|
| Table of Contents (T01402.001-T01402.057) ..... | 1 | Table of Contents (T01402.001-T01402.010) ... | 1 |
| RM T01402.050B. - RM T01402.057-7 ..... | 62 | | |

## Background

This transmittal introduces guides and procedures for the reviews of assignment decisions that SSA is required to make under the Coal Industry Retiree Health Benefit Act (The Coal Act) of 1992. Under the Coal Act, an assigned operator (or related company) may request the miner's detailed earnings history and

the basis for the assignment. If an operator (or related company) disagrees with the assignment decision, it may then request review of the assignment decision and submit evidence which demonstrates the assignment is incorrect. SSA's review decisions are final. Since all of this material is new, the transmittal should be read carefully.

Some of the notices referred to in this transmittal have not yet been cleared and approved by the Notice Policy staff but will be added as exhibits in a later transmittal.

U.S. Department of Health and Human Services
Social Security Administration
Office of Policy
SSA PUB. No. 68-0101402
I.C.N. NONSTOCK

Effective Date: Upon Receipt

Selective Distribution
PSC



## FURNISHING EARNINGS INFORMATION

**Successor Company**

A company is a *successor company* if it was a signatory to an UMWA coal wage agreement and either:

Expressly assumed health and death benefit obligations of retired persons last employed by the predecessor company by (for example):

- o payment of health care bills or death benefits; or
- o execution of a contract with a health carrier providing coverage for such persons; or

Implicitly assumed these obligations through promises of coverage or similar acts.

If no explicit or implicit assumption of obligations has occurred, then a company is a *successor company* if:

- o the new company has signed an UMWA wage agreement; and
- o a majority of the employees presently work-

ing for the successor company formerly worked for the predecessor company; and

- the location is the same geographical area and the work functions have continued relatively unchanged; and
- operations are/were not suspended for longer than six months (not counting a strike period); and





| | |
|---|---|
| Successor (or Successors) in Interest | A *successor in interest* is one (or more) successive owners who follow another in ownership or control of property. In order to be a *successor in interest*, a party must continue to retain the same rights as the original owner. The term ordinarily indicates statutory succession as, for instance, when a corporation changes its name but retains the same property. As used in a statute affecting transfers of property with intent to defraud creditors and making such transfers void as against all creditors and their "successors in interest," the term also includes the assignees of such creditors. |
| Time of Determining the Relationships | *The time of determining relationships* between signatory tory operators, related persons and successors is July 20, 1992. In such a case, the relationship shall be determined as of the time immediately before the signatory operator ceased to be in business. Relationships that arise after July 20, 1992, cannot be considered for assign- |

ment/reassignment purposes. (Also see RM T01402.002, "related company.")



**COAL ACT FAX**

Date : October 30, 1995

TO :

| | |
|---|---|
| Don Buckley, NEPSC<br>PHONE: (718) 557-3607<br>FAX: (718) 557-5014 | Annette Lovett, SEPSC<br>PHONE: (205) 801-2238<br>FAX: (205) 801-2262 |
| Mark Rekoske, GLPSC<br>PHONE: (312) 353-4274<br>FAX: (312) 353-0403 | Shirley Murphy, WNPSC<br>PHONE: (510) 970-1429<br>FAX: (510) 970-1424 |

FROM : Sam Washington, OPBP
PHONE: (410) 965-5042
FAX: (410) 966-9214

COVER +: 2

SUBJECT: Changes to Supplemental Coal Act Review Instructions #4

All six examples provided in Section G. of Sup #4 are intended to illustrate how to handle "alter ego" and "successor" relationship situations. However, Example 6, in Section B. of Sup #4, and the clarifications provided to NEPSC in my August 17, 1995 FAX are partially erroneous. Therefore, I have prepared two replacement pages for Sup #4 as follows:

Page 2: Explains the definition for "alter ego," and clarifies that the "alter ego" relationship involves the corporate "death" (at least in its original form) of the signatory operator which is then resurrected under a new corporate identity; and

Page 8: Changes Example 6 to (a) incorporate the "alter ego" clarification, and (b) include the

status of the non-mining operation which then explains its relationship to the mining operation and the signatory operator.

Attached are the two replacement pages. Please destroy the *original* July 1995 versions of these pages and insert these in their place.

If you have any questions or wish to discuss this further, please give me a call.

cc: Ernestine Durham, Edie Lee
Rich Harron, Mary Lea, Rodger Waldman

SSA-1826 ITEMIZED STATEMENT OF EARNINGS
VERSION 1984.002 * * * FOR SSN 404-28-4532 * * *

FROM: SOCIAL SECURITY ADMINISTRATION
OFFICE OF CENTRAL RECORDS OPERATIONS
BALTIMORE, MARYLAND 21235-0000

NUMBER HOLDER NAME:
JOHN R THOMAS

0- 0
PERIODS REQUESTED JANUARY 1946 TO DATE

| YEAR | JAN - MARCH | APRIL -JUNE | JULY - SEPT | OCT - DEC | TOTAL |
|---|---|---|---|---|---|
| EMPLOYER NUMBER: 61-0217610 | | | | | |
| HARLIN WALLINS COAL CORP | | | | | |
| HARLAN, KY 40831 | | | | | |
| 1946 | 631.25 | 330.57 | 598.40 | 497.30 $ | 2,057.52 |
| 1947 | 880.31 | 859.18 | 724.63 | 535.88 $ | 3,000.00 |
| 1948 | 743.42 | 802.54 | 1,271.65 | 182.39 $ | 3,000.00 |
| 1949 | 725.06 | 883.43 | 282.14 | 548.11 $ | 2,438.74 |
| 1950 | 794.95 | 1,080.32 | 1,030.94 | 93.79 $ | 3,000.00 |
| 1951 | 877.46 | 994.09 | 745.04 | 1,187.99 $ | 3,804.58 |
| 1952 | 1,091.89 | 1,127.56 | 841.61 | 538.94 $ | 3,600.00 |
| 1953 | 517.83 | | | 352.40 $ | 870.23 |
| 1954 | | 8.33 | | $ | 8.33 |
| 1955 | | | 1,276.64 | 1,280.49 $ | 2,557.13 |
| 1956 | 836.83 | 1,280.59 | 512.51 | 1,031.30 $ | 3,661.23 |
| 1957 | 910.85 | 1,270.27 | 1,504.93 | 513.95 $ | 4,200.00 |
| 1958 | 517.83 | 75.00 | | $ | 592.83 |
| EMPLOYER NUMBER: 34-4205140 | | | | | |
| CITY AUTO STAMPING CO DIV OF GLOBE | | | | | |
| WERNICKE INDUSTRIES INC | | | | | |
| LINT & DURA AVE | | | | | |
| TOLEDO, OH 43612 | | | | | |
| 1953 | 241.38 | 1,131.99 | 951.76 | 389.83 $ | 2,714.96 |

PAGE 001

BEST AVAILABLE COPY

SSA-1826 ITEMIZED STATEMENT OF EARNINGS
VERSION 1984.002 * * * FOR SSN 404-28-4532 * * *

| YEAR | JAN - MARCH | APRIL -JUNE | JULY - SEPT | OCT - DEC | | TOTAL |
|---|---|---|---|---|---|---|
| EMPLOYER NUMBER: 62-0217610 | | | | | | |
| 1953 | | | 8.33 | | $ | 8.33 |
| EMPLOYER NUMBER: 61-0399162<br>STEVE MIDDLETON<br>WILCAT BRANCH COAL CO 1<br>VERDA, KY 40872 | | | | | | |
| 1954 | | | 425.20 | | $ | 425.20 |
| 1960 | | | | 242.25 | $ | 242.25 |
| 1961 | 489.22 | 637.06 | 717.39 | 481.00 | $ | 2,324.67 |
| 1962 | 581.75 | 442.00 | 988.04 | 698.80 | $ | 2,710.59 |
| 1963 | 456.57 | 1,165.27 | 513.76 | 1,015.65 | $ | 3,151.25 |
| 1964 | 363.75 | 120.00 | | | $ | 483.75 |
| EMPLOYER NUMBER: 61-0339162 | | | | | | |
| 1954 | | | | 393.10 | $ | 393.10 |
| 1955 | 466.00 | 452.00 | | | $ | 918.00 |
| EMPLOYER NUMBER: 61-0306570<br>D E PERKINS<br>HARLAN, KY 40831 | | | | | | |
| 1958 | | 52.50 | | | $ | 52.50 |
| EMPLOYER NUMBER: 61-0510304<br>HARLAN EVERGLOW COALS INC<br>THREE POINT, KY 40815 | | | | | | |
| 1958 | | | 676.80 | 630.15 | $ | 1,306.95 |
| 1959 | 620.40 | | 70.00 | 1,035.46 | $ | 1,725.86 |

PAGE 002

SSA-1826 ITEMIZED STATEMENT OF EARNINGS
VERSION 1984.002 * * * FOR SSN 404-28-4532 * * *

| YEAR | JAN - MARCH | APRIL -JUNE | JULY - SEPT | OCT - DEC | | TOTAL |
|---|---|---|---|---|---|---|
| 1960 | 1,393.08 | 692.05 | 738.97 | 626.52 | $ | 3,450.62 |
| 1961 | 54.00 | | | | $ | 54.00 |

EMPLOYER NUMBER: 61-0560972
DAVES BRANCH COAL CO INC
TA DAVES BRANCH COAL CO INC
LENARUE, KY 40818

| | | | | | | |
|---|---|---|---|---|---|---|
| 1962 | | | | 57.85 | $ | 57.85 |

EMPLOYER NUMBER: 61-0588137
LITTLE KNOB COAL COMPANY
INCORPORATED
WOODLANDS HILLS
HARLAN, KY 40831

| | | | | | | |
|---|---|---|---|---|---|---|
| 1962 | | | | 125.20 | $ | 125.20 |
| 1963 | 268.60 | | | | $ | 268.60 |

EMPLOYER NUMBER: 61-0606844
SHACKLEFORD COAL CO INC
KELLY & ASSOCIATES
SUCCESSOR IN INTEREST TO
PO BOX 797
HARLAN, KY 40831

| | | | | | | |
|---|---|---|---|---|---|---|
| 1965 | 720.00 | 573.75 | 660.00 | 1,222.50 | $ | 3,176.25 |
| 1966 | 587.50 | 1,205.00 | 600.00 | 1,162.50 | $ | 3,555.00 |
| 1967 | 1,231.25 | 1,410.63 | 1,184.91 | 1,283.95 | $ | 5,110.74 |
| 1968 | 1,219.32 | 1,380.00 | 1,029.00 | 1,389.57 | $ | 5,017.89 |
| 1969 | 1,333.50 | 1,672.50 | 1,137.00 | 1,477.00 | $ | 5,620.00 |
| 1970 | 1,329.25 | 1,453.50 | 78.00 | | $ | 2,860.75 |

OUR RECORDS MAY NOT SHOW ALL THE EARNINGS REPORTED FOR THE PERIODS ENDING AFTER DECEMBER 1991 BECAUSE OF THE TIME REQUIRED TO RECEIVE AND PROCESS REPORTS.

THERE ARE NO OTHER EARNINGS RECORDED UNDER THIS SOCIAL SECURITY NUMBER FOR THE PERIOD REQUESTED.

PAGE 003 END

[DATE AND TRANSMITTAL INFORMATION OMITTED]

TO : Southeastern Program Service Center
ATTN: Annette Lovette

SUBJECT: Successor Company and Signatory Date Issues in Jericol Mining, Inc., [REDACTED]

We have the following general comments:

- The basic criteria for determining when a company is a successor to another is discussed in our memorandum to NEPSC dated August 9, 1994 (attached). Ordinarily, the application of these criteria to the evidence presented by the assignee-appellant and other available SSA and UMWA Fund evidence should suffice in reaching the review decision. Bills of sale/transfer, incorporation, and similar business documents should be taken literally, so there ought to be little need for "interpreting" them. However, if such documents contain unfamiliar terms, refer to precedent law cases, or raise other issues—and these affect the review decision—you may submit them to us for advice.

- The Coal Act does not permit us to impute a related company's signatory status to that of the signatory operator; that is, a pre-1978 signatory cannot be treated as a 1978 (or later) signatory simply because its parent or "sister" company is a 1978 (or later) signatory. Section 9706(a) of the Coal Act makes it clear that assignments to 1978



signatories are made to "the most recent signatory operator *to employ* the coal industry retiree" (emphasis supplied). Nor does the definition of "signatory operator" in Section 9701(c)(1) include a "related person". Once a company is found to be a related company of an operator, only its active status is material–except in the uncommon case described in POMS RM T01402.003D when we can combine the miner's work periods for the signatory operator and the related company *if he worked for both.*

- In the case of a "successor" or "successor in interest", we may speak of them as "related" but, in fact, these entities are treated as continuing the predecessor business activities. That is, successors or successors in interest are treated for assignment purposes as if there had been no change of ownership. When the Hot List was created, SSA had very limited information about the type of relationship that existed between a signatory operator and its "related company". All that was known, generally, was that some type of relationship existed and, most probably these would prove to be parent-child or sister company relationships. Original assignments had to be based on these "best" assumptions. Now, as additional evidence of company relationships is becoming available during the administrative review process, it appears that this assumption was correct but that some relationships actually involve successors or even just name changes for the signatory operator. Such new evidence may well lead to reversal of

some assignment decisions, but this was expected to be the case.

We have these specific comments:

- *Jericol Mining*—In this case, *Jericol (formerly Irdell Mining, Inc.)* was assigned as the successor to *Shackleford Coal Company*. The assignee has submitted a copy of its purchase agreement with *Shackleford* from 1973. The review is based upon a claim that not all of *Shackleford's* assets were purchased but that some were purchased by *Dale Company*; other allegations about the nature of the purchase clearly contradict the plain wording of the purchase agreement. Evidence in file shows *Jericol* adopted use of the *Shackleford* name, continued operations under *Shackleford's* UMWA agreement, and met other criteria tending to show it is the successor. We agree with your analysis of the evidence and your conclusion that *Jericol* is in fact the successor to *Shackleford.*

The assignee referred to the precedent case of *Cox v. Feeders Supply Company* in support of its review request. We have reviewed the case and found it was decided "under the facts of this case" which are so different that it would not support the assignee's appeal.

REDACTED MATERIAL OMITTED



If you need to discuss this, you may call me on (410)-965-7887.

/s/ RAY WORLEY
RAY WORLEY

Attachment
cc: NEPSC
GTLPSC
WNPSC

bcc: Sam Washington

Final:RWorley:vdobbins:8/18/94
wp:RAY:se-misc.epa

AUG 09 1994
ER 20-2

TO : Northeastern Program Service Center
ATTN: Jim Downey

SUBJECT: Transfer of Business and Successor Issues under the Coal Act, [MATERIAL REDACTED] REPLY

We have the following general comments:

- The basic criteria for determining whether a business transfer was made to a successor or some other party [MAERIAL REDACTED] material is: when a transfer is made to another owner who continues the former owner's operation with little or no interruption or change, the new owner is a successor.

- The decision as to whether a transfer was to a successor or another is often a difficult matter of judgement. Most business transfers have common elements that do not clearly identify successors from others; such elements include:

  —Sale of the owner's operating equipment and sale or lease of land used in the former operation;

  —"Hold harmless" agreements that exempt the buyer from liabilities incurred by the former owner prior to the transfer;



  —Obligation of former owner to continue operations between the transfer agreement date and final closing of the transfer; and

  —Completion by the buyer of any contracts of the former owner that are still pending at final closing of the transfer.

- The elements that tend to support a finding that a business transfer was to a successor are these:

  —Employees of the former owner continue to work for the new owner with little or no interruption after the transfer. Where the former owner's operations were covered by a UMWA wage agreement, UMWA Fund records may show work continued for the new owner at the same mine after the transfer. In other cases, scouting to SSA's earnings records will show whether most of the former owner's employees continued to work for the new owner after the transfer;

  —The former owner transferred the business trade name to the new owner. This is often evidenced by the former owner agreeing to file of "cancellation of fictitious name" with the State corporation registration agency, so the new owner can use the same company name. In some cases, the new owner may adopt a name similar to the former owner's business name;

—The former owner agrees not to compete with the new owner's business, or not to compete in the same geographical area;

—The transfer includes sale of "good will" reputation with customers and others), or the turning over of customer records, business records, contracts, leases, and the like;

—The prior owner agrees to work for the new owner as a consultant or employee;

—The transfer changes ownership of a whole subsidiary or division previously owned by the transferring corporation; or

—The transfer is between related persons in a family business or the new owner was an employee of the former business.

[MATERIAL REDACTED]

FAXED TO ALL PSCs 8/10/94

(5)

Supreme Court, U.S.
FILED
JUN 21
JUN 21 2001

No. 00-1307

# In the Supreme Court of the United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

SIGMON COAL COMPANY, INC., AND JERICOL MINING, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE PETITIONER

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*

STUART E. SCHIFFER
*Acting Assistant Attorney General*

EDWIN S. KNEEDLER
*Deputy Solicitor General*

PAUL R.Q. WOLFSON
*Assistant to the Solicitor General*

MARK B. STERN
JEFFREY CLAIR
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, established the United Mine Workers of America Combined Benefit Fund (Combined Fund) to ensure the continued provision of health-care benefits to retired miners (and the dependents of miners) who worked under collective bargaining agreements that promised lifetime health-care benefits. For the purpose of calculating premiums to be paid to the Fund to finance those health-care benefits, the Coal Act directs the Commissioner of Social Security to assign responsibility for beneficiaries of the Fund to the "signatory operator" or "related person" of the signatory operator that formerly employed the miners, if that signatory operator (or related person) is still "in business." 26 U.S.C. 9706(a).

The question presented is whether the Coal Act permits the Commissioner to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business.

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# In the Supreme Court of the United States

No. 00-1307

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

SIGMON COAL COMPANY, INC., AND JERICOL MINING, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 226 F.3d 291. The opinion and order of the district court (Pet. App. 63a-64a, 65a-78a) are reported at 33 F. Supp. 2d 505. The order of the district court denying the government's motion for reconsideration (Pet. App. 79a-80a) is unreported. Orders of the Social Security Administration affirming the assignment of responsibility for various individuals to respondents (Pet. App. 45a-62a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 29, 2000. A petition for rehearing was denied on

November 15, 2000 (Pet. App. 81a-82a). The petition for a writ of certiorari was filed on February 13, 2001, and was granted on April 23, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

The pertinent provision of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701(c)(2)(A), is reprinted in an appendix to this brief (App., *infra*, 1a), and at p. 9, *infra*.

## STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, in response to a crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of promised lifetime health-care benefits. Before enactment of the Coal Act, the health-care benefits of many retired coal miners were financed through multiemployer trusts established by collective bargaining agreements, known as National Bituminous Coal Wage Agreements (NBCWAs), between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators Association (BCOA). The NBCWA executed in 1974 provided that the health-care benefits of all active miners and those who retired in 1976 or later would be provided through the multiemployer UMWA 1974 Benefit Plan and Trust (1974 Benefit Plan), and the benefits of miners who retired before 1976 would be provided through the UMWA 1950 Benefit Plan and Trust (1950 Benefit Plan). The NBCWA executed in 1978 altered this arrangement; under the 1978 NBCWA, coal mine operators who were signatories to the NBCWAs (known as "signatory operators") individually provided for the health-care benefits of their own active and retired employees, while the 1974 Benefit Plan thenceforth covered those retirees whose employers were no longer in business. See generally



*Eastern Enters.* v. *Apfel*, 524 U.S. 498, 504-511 (1998) (plurality opinion).[1]

In the 1980s and 1990s, the financial stability of the trusts was seriously threatened. A principal cause of the peril was that many coal operators were withdrawing from unionized operations and the coverage of the NBCWAs, or were going out of business altogether. "As more and more coal operators abandoned the Benefit Plans, the remaining signatories were forced to absorb the increasing cost of covering retirees left behind by exiting employers. A spiral soon developed, with the rising cost of participation leading more employers to withdraw from the Benefit Plans, resulting in more onerous obligations for those that remained." *Eastern*, 524 U.S. at 511.

After a protracted strike at the Pittston Coal Company in 1989, in which health-care benefits were a principal issue, the Secretary of Labor established an advisory commission (the Coal Commission) to report on the causes of the financial crises in the Benefit Plans and to suggest solutions. The Coal Commission reported that a principal problem facing the Plans was how to finance the health-care benefits of "orphaned retirees," *i.e.*, those retired miners whose former employers had gone out of business or had ceased contributing to the Benefit Plans, thus "dumping" responsibility for the orphans onto the signatory operators who remained in the NBCWA system. See *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102 Cong., 1st Sess. 145 (1991). The Coal Commission was unable to reach a consensus on the mechanism for resolving the financial crisis; some members preferred a financial obligation imposed on the entire coal

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[1] Unless otherwise indicated, all references in this brief to the *Eastern* decision are to Justice O'Connor's plurality opinion.

industry (including operators who were never members of the BCOA), whereas others preferred that any obligation be confined to those who had participated in the NBCWA system. Compare *id.* at 226-232 with *id.* at 236-239. Both groups, however, recognized that much of the problem was caused by the fact that coal mine operators who had previously participated in the NBCWA system had avoided their obligations and shifted responsibility for their retirees onto other signatory operators by going out of business and transferring their assets to other entities. Professor Henry H. Perritt, who was Vice Chairman of the Coal Commission and favored an industry-wide solution, thus observed:

> Contract operations are a strong phenomenon in coal mining, as are thinly capitalized subsidiaries. It is not uncommon for a contract operator or a thinly capitalized subsidiary or joint venture to walk away from obligations to finance retiree health care. Frequently entities who now appear not to have had any historic involvement with the [UMWA] Funds were in fact involved as contributors of capital, as participants in joint ventures or as purchasers of contract coal. It is difficult to know whose hands are clean.

*Id.* at 229. Other members of the Commission agreed with Professor Perritt's understanding of the causes of the Benefit Plans' financial problems (although they nonetheless opposed an industry-wide tax):

> The record shows that reprehensible practices as regards successorship exist in this industry. Thinly capitalized operators, often the sham invention of larger firms, come and go in a fashion that appears to exist only to avoid the risk of being held as a party to the collectively bargained agreement regarding pension and welfare benefits.



*Id.* at 237.

b. After extensive consideration, Congress decided not to impose an industry-wide tax to shore up the financial stability of the Benefit Plans, but decided instead to ensure that the obligations of operators who had participated in the NBCWA system to their retirees were not avoided through the kinds of practices decried by the Coal Commission.[2] Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry] retirees," to "allow for sufficient operating assets for [coal industry retiree health-care benefit] plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142, 106 Stat. 3037.

In furtherance of those ends, the Coal Act established the United Mine Workers of America Combined Benefit Fund (Combined Fund or Fund) as a private multiemployer health benefit plan.[3] See 26 U.S.C. 9702(a). The Combined Fund

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[2] Both Houses of Congress initially passed a bill that would have provided for orphan retirees' benefits through taxes on coal production and imports. The President vetoed that bill, however, and the financing provisions of the Coal Act eventually took a different form. See *Eastern*, 524 U.S. at 513-514; pp. 33-34 n.11, *infra*.

[3] The Coal Act also established another private fund, the 1992 UMWA Benefit Plan (1992 Plan), which is not at issue here. The 1992 UMWA Benefit Plan is intended to provide health-care benefits for retired miners who would have met the age and service requirements under the 1950 and 1974 Plans as of February 1, 1993, who retired between July 21, 1992, and September 30, 1994, and whose last signatory operator did not provide the health-care benefits promised under a 1978 or later NBCWA. See 26 U.S.C. 9712(b); 138 Cong. Rec. 34,004 (1992) (explanation by Sen. Wallop).

provides health-care benefits to beneficiaries who, at the time of passage of the Act, were receiving, or were eligible to receive, benefits from the 1950 or 1974 Benefit Plan. See 26 U.S.C. 9702(a)(2), 9703(a) and (f). The Combined Fund is financed by premiums to be paid by the "signatory operator[s]" (or "related person[s]" of those signatory operators) that formerly employed the beneficiaries and that remain "in business." 26 U.S.C. 9704, 9706(a). The Act generally defines "signatory operator" as "a person which is or was a signatory to a coal wage agreement," 26 U.S.C. 9701(c)(1), including the NBCWAs negotiated between the UMWA and the BCOA, 26 U.S.C. 9701(b)(1).

The Act vests in the Commissioner of Social Security (Commissioner)[4] the responsibility for assigning eligible Combined Fund beneficiaries (miners and their surviving spouses and dependents) to signatory operators or related persons. 26 U.S.C. 9706(a). Assignments are made according to a three-tiered hierarchy:

*First*, the Commissioner must seek to assign a beneficiary to the "signatory operator" (or "related person") that remains "in business," signed a collective bargaining agreement with the UMWA in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for at least two years. 26 U.S.C. 9706(a)(1). The Act specifies that "a person shall be considered to be in business if such person conducts or derives revenue from

[4] Many references in the legislative record are to the Department of Health and Human Services, which at the time included the Social Security Administration. In 1995, the Social Security Administration became an independent agency within the Executive Branch, and the Commissioner of Social Security assumed the duties of the Secretary of Health and Human Services under the Coal Act. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 108(h)(9)(A), 108 Stat. 1487.



any business activity, whether or not in the coal industry." 26 U.S.C. 9701(c)(7).

*Second*, if an assignment of a particular beneficiary cannot be made under the first tier, the Commissioner must attempt to assign the beneficiary to the signatory operator (or related person) that remains in business, signed a collective bargaining agreement with the UMWA in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for any period of time. 26 U.S.C. 9706(a)(2).

*Third*, if an assignment cannot be made under the first or second tier, the Commissioner must seek to assign the beneficiary to the signatory operator (or related person) that remains in business and employed the miner in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 collective bargaining agreement. 26 U.S.C. 9706(a)(3).[5]

[5] In our petition for a writ of certiorari (at 6 n.2), we stated that this case does not involve assignments made under the third tier of Section 9706(a)(3). As respondents have pointed out (Br. in Opp. 4 n.3), that is incorrect; the assignments were in fact made under the third tier. See, *e.g.*, Pet. App. 61a. In *Eastern*, this Court held unconstitutional an application of the Coal Act's third tier, under which the Commissioner had assigned a beneficiary to a coal mine operator that had not signed a collective bargaining agreement with the UMWA in 1974 or later. The Court stressed that the NBCWAs before 1974, unlike those in 1974 and later, did not expressly promise miners health-care benefits for life. See 524 U.S. at 530-531 (plurality opinion); *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part).

The assignments at issue in this case were made to a company, respondent Jericol Mining, Inc., that did sign the 1974 NBCWA, which promised miners lifetime benefits. See Pet. App. 11a. Respondents nonetheless alleged, in a "supplemental" complaint, that those assignments were also unconstitutional under *Eastern* because, while the assignee Jericol was a 1974 signatory, Shackleford, the operator that employed the beneficiaries, to whom Jericol was found by the Commissioner to be a successor, was not

*Finally*, if an assignment cannot be made under any of the three tiers, then the beneficiary is considered "unassigned." See 26 U.S.C. 9704(a)(3) and (d). The health-care benefits of unassigned miners are financed with funds transferred from interest earned on the Department of the Interior's Abandoned Mine Reclamation Fund, 26 U.S.C. 9705(b), or, if that source of funds is exhausted or unavailable, from an additional premium imposed on all assigned signatory operators in a *pro rata* fashion, 26 U.S.C. 9704(d). Congress understood, however, that a principal cause of the crisis in the prior NBCWA system was the cost of financing benefits for "orphan" retirees whose employers had terminated their contribution obligations, and so it intended that the number of unassigned beneficiaries under the Coal Act be kept to "an absolute minimum." 138 Cong. Rec. 34,003 (1992) (explanation by Sen. Wallop).

Because the Commissioner must determine whether a beneficiary can be assigned to either a signatory operator *or*

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a 1974 signatory. See J.A. 13-14. The lower courts did not reach that constitutional question; they ruled rather that the assignments to Jericol were inconsistent with the statute. Pet. App. 73a-78a, 23a-36a. *Eastern* thus is not relevant to the question presented here, which is confined to an issue of statutory construction.

Respondents have recognized (Br. in Opp. 4 n.3) that any constitutional implications under *Eastern* from the third-tier assignment in this case are not properly before this Court, because the lower courts resolved this case solely on statutory-interpretation grounds. Respondents, moreover, did not argue in their brief in opposition that the Court should deny certiorari because the judgment below was independently sustainable on constitutional grounds. Any further litigation of constitutional issues, therefore, should await a remand of this case to the court of appeals. If this Court reverses the court of appeals' ruling and holds that, under the Coal Act, responsibility for a signatory operator's employee may be placed on the direct successor in interest of that operator, then respondents may be able to pursue their *Eastern* claim on remand, provided that the *Eastern* claim was properly preserved in the lower courts.



any related person to a signatory operator under one of the tiers before proceeding to the next tier, the concept of "related person" is central to the operation of the Act. The Act provides an expansive definition of "related person":

> A person shall be considered to be a related person to a signatory operator if that person is—
>
> (i) a member of the controlled group of corporations (within the meaning of [26 U.S.C.] 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under [26 U.S.C.] 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

26 U.S.C. 9701(c)(2)(A). This definition of "related person" ensures that a signatory operator's beneficiaries are not dumped into the unassigned pool merely because the signatory dissolved its corporate form or drained away its assets. It accomplishes that objective by making affiliates ("related persons") of a signatory operator responsible for Coal Act premiums for a Combined Fund beneficiary if, for some reason, the entity that was the signatory operator itself is unable to pay.

Congress also expressly provided, in the final sentence of Section 9701(c)(2)(A) quoted above, that assignments could

be made to the successor in interest of a "related person" to the signatory operator. The statute does not state *in haec verba* that an assignment may be made to a direct successor in interest of the entity that was the signatory operator itself. The Commissioner has concluded, however, that in light of the text, structure, and purposes of the Coal Act, such direct successors in interest are included within the liability scheme of the statute as well, and should be responsible for a signatory operator's Combined Fund premiums if the signatory operator itself is defunct and if there is no other "related person" to that operator that is still in business. See Social Security Administration Supplemental Coal Act Review Instructions No. 4 (July 1995), Pet. App. 83a-94a. The Commissioner has also concluded that a business should be deemed a successor in interest of a signatory operator or other related person if it has, through purchase, merger, or other transaction, acquired substantial assets from the signatory or its related person, if it continues running the same operation in the same location, and if it uses many of the same employees who worked for the former owner. *Id.* at 86a.

2. a. This case involves financial responsibility for the health-care benefits of 86 beneficiaries of the Combined Fund who were assigned to respondent Jericol Mining Corporation on the ground that Jericol was the successor in interest of the pertinent employer that was a signatory operator.[6] Those 86 beneficiaries are miners (or widows or dependents of miners) who had worked for the Shackleford

[6] None of the pertinent assignments was made to respondent Sigmon Coal Company. The district court stated that Sigmon joined Jericol as a plaintiff in this case because Sigmon is in turn a "related person" to Jericol and thus is jointly and severally liable for premiums owed by Jericol. Pet. App. 66a; see also 26 U.S.C. 9704(a) ("Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.").



Coal Company, a family-owned coal mining company located in Kentucky. In 1973, Irdell Mining, Inc., bought Shackleford's coal mining assets. Pet. App. 10a. The sales contract provided that Irdell would assume responsibility for Shackleford's outstanding contracts, including its collective bargaining agreement with the UMWA. *Ibid.*; J.A. 23, 26. Irdell also acquired the right to use the Shackleford name. J.A. 16. Shortly thereafter, the original Shackleford went out of business. Irdell, however, continued to operate Shackleford's mines under the existing collective bargaining agreement, using the name of Shackleford and using many of the original Shackleford's former employees. Pet. App. 10a-11a. While it was using the Shackleford name, Irdell signed the 1974 NBCWA with the UMWA. *Id.* at 11a.

Irdell eventually adopted the name Jericol Mining Company. Pet. App. 11a. Jericol continued the coal mining operations that it had conducted under the Shackleford corporate name (*ibid.*) and retained the Employer Identification Number it had used to pay Social Security taxes for its employees under the Shackleford name. *Id.* at 48a.

b. In a series of decisions, the Social Security Administration assigned to Jericol 86 Combined Fund beneficiaries who were employed by (or who are widows or dependents of miners employed by) Shackleford. Pet. App. 11a. Jericol filed administrative appeals of those assignment decisions, and the Commissioner denied those appeals on the ground that Jericol is the successor in interest of Shackleford.[7] See

[7] When the Commissioner assigns a Combined Fund beneficiary to a signatory operator or related person, he so notifies the assigned operator, 26 U.S.C. 9706(e)(2), which then has 30 days to request "detailed information as to the work history of the beneficiary and the basis of the assignment," 26 U.S.C. 9706(f)(1). After receiving that information, the assigned operator has an additional 30 days to request review of the assignment decision. 26 U.S.C. 9706(f)(2). If, on review, the Commissioner determines that an assignment was incorrect, he rescinds the

*id.* at 45a-62a. In a representative decision, the agency explained:

> The sales contract [Jericol] submitted shows that Irdell Mining purchased the assets of Shackleford Coal, that Shackleford Coal was required to maintain the goodwill of its customers, allowed Irdell to use the name of Shackleford after the purchase, transferred responsibility for *all* outstanding contracts and agreements, and required that non-compete agreements be signed and submitted at the time of closing. You have also advised us that Irdell did conduct business under the Shackleford name and subsequently changed the company's name to Jericol Mining.

*Id.* at 48a-49a. The agency therefore concluded that Jericol is responsible for the Combined Fund premiums for retirees who worked for Shackleford and for their dependents. *Id.* at 49a.

c. Respondents challenged the Commissioner's final administrative decisions in district court. Respondents acknowledged that the Coal Act authorizes the Commissioner to assign responsibility for a Combined Fund beneficiary to a "related person" of the original signatory operator (such as a corporate affiliate of the signatory operator) and also authorizes the Commissioner to assign responsibility to a successor in interest of such a corporate affiliate of a signatory operator. Respondents argued, however, that the Coal Act does not permit the Commissioner to assign responsibility for a beneficiary to the direct successor in interest of a signatory operator itself. The district court

assignment and reviews the beneficiary's record to determine whether the beneficiary should be assigned to another operator. 26 U.S.C. 9706(f)(3)(A). If the Commissioner determines that there was no error in the assignment, he so notifies the assigned operator. 26 U.S.C. 9706(f)(3)(B).



agreed, and granted respondents' motion for summary judgment. Pet. App. 65a-78a.

d. The Commissioner appealed, and a divided panel of the court of appeals affirmed. Pet. App. 1a-44a.

The majority, after determining that the district court had subject-matter jurisdiction over respondents' claims for equitable relief,[8] concluded that the Coal Act did not authorize

[8] In *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (1996), cert. denied, 520 U.S. 1118 (1997), the Fourth Circuit held that Coal Act premiums are "taxes" within the meaning of the Anti-Injunction Act, 26 U.S.C. 7421(a) (1994 & Supp. V 1999), and the tax-exclusion provision of the Declaratory Judgment Act, 28 U.S.C. 2201(a), which generally bar district court jurisdiction over suits seeking declaratory or equitable relief against the collection of "taxes." The Fourth Circuit nonetheless ruled in *Leckie* that a signatory operator in bankruptcy proceedings that had been assigned responsibility for the health-care costs of beneficiaries of the Combined Fund and 1992 Plan could maintain a suit for a declaration that a prospective purchaser of the signatory operator's assets would not be jointly and severally liable for the signatory's obligations to the Combined Fund and 1992 Plan. The Fourth Circuit concluded that the signatory operator would have no other means of obtaining a judicial resolution of that question. See *Leckie*, 99 F.3d at 584-585; see also *Pittston Co.* v. *United States*, 199 F.3d 694, 701-704 (4th Cir. 1999) (relying on *Leckie*'s holding that Coal Act premiums are "taxes" to conclude that a party that has paid Coal Act premiums to the Combined Fund may maintain tax-refund suit against United States to recover those premiums).

In this case, the court of appeals ruled that, although *Leckie* had held that Combined Fund premiums are "taxes," nonetheless the Anti-Injunction Act and Declaratory Judgment Act did not bar respondents' claims for equitable relief against the collection of Coal Act premiums. Pet. App. 17a-23a. The court reasoned (*ibid.*) that the Coal Act establishes procedures specifically intended to permit judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, of claims that the Commissioner's assignments of beneficiaries under the Coal Act are invalid (see 26 U.S.C. 9706(f)), and that those specific statutory judicial-review provisions prevail over the more general restraints against declaratory and equitable relief set forth in the Anti-Injunction Act and the Declaratory Judgment Act.

We agree that the district court had subject-matter jurisdiction over respondents' claims, but not for the reasons relied on by the court of appeals. In our view, Coal Act premiums are not "taxes" within the meaning of the tax-refund statute, 28 U.S.C. 1346(a)(1), or the bars to declaratory and equitable relief set forth in the Anti-Injunction Act and the Declaratory Judgment Act. Coal Act premiums are not compelled contributions for the support of the government; rather, they are assessed and paid to finance the operations of the UMWA Combined Benefit Fund, a private entity, not those of the United States. See *United States* v. *Butler*, 297 U.S. 1, 61 (1936) ("A tax, in the general understanding of the term, * * * signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another."); *United States* v. *La Franca*, 282 U.S. 568, 572 (1931) ("A tax is an enforced contribution to provide for the support of government."); see also *Eastern*, 524 U.S. at 521 (observing that "[t]he payments mandated by the Coal Act, although calculated by a Government agency, are paid to the privately operated Combined Fund," and so in a taking claim, "Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act").

It is therefore the position of the United States that the limitations on declaratory and equitable relief concerning tax liability in the Anti-Injunction Act and the Declaratory Judgment Act (as well as the statutory provisions for tax-refund suits against the United States at issue in *Pittston*) have no application to Coal Act premiums. Rather, respondents' challenge to the Commissioner's assignment decisions, which concern the construction of a federal statute, falls squarely within the district court's federal-question jurisdiction under 28 U.S.C. 1331, and is cognizable under the APA, 5 U.S.C. 704, as a suit for judicial review of final agency action. See also 26 U.S.C. 9706(f)(5) (contemplating "review" of Commissioner's assignment decisions "by a court"). The district court therefore had the attendant authority to issue appropriate equitable relief, without regard to the restrictions imposed by the Anti-Injunction Act and the Declaratory Judgment Act.

The Fourth Circuit's decision in *Leckie* to the effect that Coal Act premiums are "taxes" relied on the decision of the Second Circuit in *In re Chateaugay Corp.*, 53 F.3d 478, 498, cert. denied, 516 U.S. 913 (1995), which held that Coal Act premiums are "taxes" entitled to administrative priority in bankruptcy. See also *Adventure Res., Inc.* v. *Holland*, 137 F.3d 786, 794 (4th Cir.) (adopting same ruling, based on *Leckie* and *Chateaugay*), cert. denied, 525 U.S. 962 (1998). In our view, however, the question whether certain obligatory payments owed to a private party are entitled to priority in the bankruptcy system as "taxes" is quite different from the question whether (as in *Pittston*) a refund suit will lie against the United States to recover payments made to a private party or whether (as in this case) a district court has authority under the APA to adjudicate issues concerning the administrative assignment of beneficiaries that gives rise to the obligation to make those payments. Accordingly, although we believe that Coal Act premiums are not "taxes" under the tax refund statute, the Anti-Injunction Act, or the Declaratory Judgment Act, that does not in our view control the substantive legal question whether those premiums would be entitled to priority in bankruptcy. Cf. *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 220-224 (1996) (Internal Revenue Code's characterization of a liability as a "tax" does not control whether liability is a "tax" for bankruptcy priority purposes).



the Commissioner to assign Fund beneficiaries to the direct successor in interest of a signatory operator that is no longer in business. The majority first rejected (Pet. App. 24a-26a) the Commissioner's position that the text of the Coal Act permits assignment to the direct successor of an original signatory. The Commissioner had pointed out that Section 9701(c)(2)(A) expressly authorizes assignments to the successor in interest of "any person described" in clause (i), (ii), or (iii) of 26 U.S.C. 9701(c)(2)(A), and had argued that the original signatory operator itself is one of the persons "described" in those clauses because each of the pertinent clauses in turn describes a group or family of related companies that includes the signatory operator itself. The majority rejected that construction and concluded that the clauses defining "related person" identify only classes of persons that have a relationship to the signatory operator and do not "describe" the signatory operator itself. Pet. App. 24a-25a. Thus, the majority ruled that, although the text of the Coal Act does expressly authorize an assignment

to the successor in interest of a person related to a signatory operator, it does not expressly provide for an assignment to the direct successor in interest of the signatory operator itself. *Id.* at 25a-26a.

Second, the majority, expressly disagreeing with the decision in *R.G. Johnson Co.* v. *Apfel*, 172 F.3d 890 (D.C. Cir. 1999), rejected the submission that the Coal Act should be construed to permit assignments to direct successors in interest in order to avoid results that would be plainly inconsistent with Congress's objectives in enacting the statute. Pet. App. 26a-31a. In *R.G. Johnson*, the District of Columbia Circuit sustained assignments to the direct successor in interest of a signatory operator after concluding that the failure to permit such assignments would frustrate Congress's intent to stabilize the financing of the Fund and to place liability for that financing on the businesses most responsible for plan liabilities. See 172 F.3d at 895. The panel majority in the court below, by contrast, concluded that Congress might reasonably have decided to promote sales of coal companies by shielding a direct purchaser of the signatory operator's assets from additional liabilities not contemplated in the original transaction. Pet. App. 33a-34a.

The majority acknowledged that it is anomalous to interpret the statute to permit liability to attach to the successor of a person "related" to the original signatory while shielding from liability the direct successor of the original signatory itself. Pet. App. 34a. The majority also acknowledged the legislative history supporting the Commissioner's construction. *Id.* at 30a-31a. But, the court concluded, "we are not simply free to ignore unambiguous language because we can imagine a preferable version." *Id.* at 34a.

Judge Murnaghan dissented. Pet. App. 37a-44a. He agreed with the D.C. Circuit's decision in *R.G. Johnson* that a literal construction of the Coal Act to exempt direct successors in interest of the signatory operator, from liability would conflict with Congress's clear purposes in enacting the statute. *Id.* at 41a. Judge Murnaghan stressed that a principal objective of the Coal Act was to ensure that a signatory operator's responsibility for its retired miners' health-care benefits was not shifted to other companies that had participated in the NBCWA system but had had no relationship with those retired miners, and that that purpose would be frustrated if the obligation to pay Combined Fund premiums for a signatory operator's retirees could not be placed on the direct successor of the signatory. *Id.* at 42a-43a. Indeed, he noted that the majority's suggestion that Congress might have wanted to promote the sale of coal companies by freeing the purchaser from responsibility for retirees' health benefits was contrary to the very premise of the Coal Act, for "[t]he widespread dumping of retirees by signatory operators leaving the coal industry was the principal cause of the coal industry's crisis. * * * In light of this history, it is unimaginable that Congress could have intended to promote the sale of coal companies to successors who would not be liable for Fund benefits." *Id.* at 42a. He therefore concluded that "[e]xcluding successors in interest to signatory operators from liability for Fund benefits is plainly inconsistent with Congress's intent in enacting the Coal Act." *Id.* at 44a.



## SUMMARY OF ARGUMENT

A. The Coal Act provides that financial responsibility for the health-care costs of the employees of a signatory operator that signed a National Bituminous Coal Wage Agreement may be placed on the direct successor in interest of the signatory operator, if the operator is no longer in business. Under the Coal Act, the Commissioner of Social Security is to assign responsibility to the signatory operator or to any "related person," and the definition of "related person" includes any successor in interest. The pertinent provision,

26 U.S.C. 9701(c)(2)(A), after identifying in three clauses who shall be "considered" to be a related person to a signatory operator, further provides that a "related person" shall also "include" any successor in interest of a person "described" in any of those three clauses. The signatory operator is expressly referred to—and thus "described"—in each of the three clauses. Accordingly, under the express terms of the final sentence of Section 9701(c)(2)(A), a successor in interest of the signatory operator is a "related person" that the Commissioner may determine is responsbile for the signatory's retiree health-benefit liability under the Act.

This construction of the statute is far more consistent with the background, legislative history, and purposes of the Coal Act than is the contrary definition of "related person" adopted by the court of appeals, which excludes the direct successor in interest of the signatory operator. Congress enacted the Coal Act to respond to a crisis in the financial situation of multiemployer plans that were supposed to continue providing health-care benefits to retired miners. A principal cause of that crisis—as explained by the advisory commission that recommended legislative solutions to it—was the common industry practice of operators going out of business, selling their operations, or withdrawing from the NBCWA system, thus dumping responsibility for their retirees onto the operators remaining within the system. The legislative history of the Coal Act makes clear that Congress sought to avoid a recurrence of that crisis, and also to avoid placing responsibility for retired miners' health-care costs on the public fisc, by adopting a broad definition of the "related persons" that would be individually responsible for particular beneficiaries' health-care costs. Interpreting "related person" to include a direct successor in interest of a signatory operator advances that objective, because it ensures that signatory operators could not dump responsibility



for their retirees onto the other operators in the NBCWA system or the public by selling their operations to another entity or changing their corporate forms. By contrast, the court of appeals' construction rewards that very practice. The lower court's construction also leads to the highly peculiar result that a direct successor in interest that assumed the coal mining operations of the signatory operator using the signatory's employees cannot be made responsible for the retirement health benefits of the signatory's employees, while a more peripherally related successor to a corporate affiliate of the signatory, in an entirely different line of business, may be made responsible. There is no reason to believe Congress intended such a strange outcome.

This construction is also consistent with background principles of successorship that this Court and the courts of appeals have adopted in other labor, employment, and benefits statutes. In cases arising under the National Labor Relations Act (NLRA), this Court has held that the National Labor Relations Board (NLRB) may require a successor corporation to adhere to some of the labor-law obligations assumed by its predecessor, even though the NLRA does not specifically speak to the issue of successor liability. Lower courts have similarly concluded, under other employment and benefits statutes, including these governing employers' withdrawal liability to multiemployer benefit plans like the Combined Fund, that successors in interest may be liable for their predecessors' obligations. These principles were settled in the case law at the time Congress enacted the Coal Act, and Congress is presumed to have been aware of that well-developed law.

B. Even if the Coal Act itself does not in terms provide that a direct successor of a signatory operator is a "related person" under Section 9701(c)(2)(A), it authorized the Commissioner to determine that a direct successor may be liable for a signatory operator's employees. The entities that are

expressly "includ[ed]" as successors under the Act are not an exclusive category, and so the Commissioner may deem other entities as well to be successors that may be liable for a signatory's employees, if to do so would be reasonable and consistent with the design of the statute. The Commissioner's determination that direct successors may be responsible for the employees of a signatory is reasonable and consistent with the Coal Act. That determination advances Congress's objectives of ensuring that individual entities with connections to employees be made responsible for those employees' retirement health-care costs, and that those costs not be made the collective responsibility of other operators in the NBCWA system with no relation to such employees, or of the public. And in light of the factors that the Commissioner has set forth to govern whether an entity will be considered a successor of a signatory operator, the Commissioner's determination is reasonable, for it limits such liability to entities that effectively continued the coal mining operations of the signatory operator. The Commissioner's administration of the Coal Act to include direct successors of signatory operators therefore should be upheld.

## ARGUMENT

### THE COMMISSIONER PROPERLY DETERMINED THAT RESPONSIBILITY FOR THE EMPLOYEES OF A SIGNATORY OPERATOR MAY BE ASSIGNED TO THE DIRECT SUCCESSOR IN INTEREST OF THAT OPERATOR

In the Coal Act, Congress sought "to identify persons most responsible" for the liabilities of the 1950 and 1974 Benefit Plans "in order to stabilize plan funding" and to "allow for the provision of health care benefits" to retired miners and their dependents. *Eastern*, 524 U.S. at 514. To that end, Congress imposed principal financial responsibility



for payment of premiums to the Combined Fund on the signatory operators that signed the NBCWAs that had required employer contributions to the 1950 and 1974 UMWA Benefit Plans. See 26 U.S.C. 9704(a), 9706(a).

Congress was aware, however, that a principal cause of the financial crisis in the Benefit Plans was the common industry practice of operators "dumping" responsibility for their retired employees by leaving the coal business or dissolving. See pp. 3-4, *supra*. Congress was also determined to prevent a recurrence of that crisis, in which operators remaining in the NBCWA system that had no relationship to retired miners were forced to shoulder those miners' health-care costs as the original signatory operators that employed those miners left the system. To minimize the problem of financing benefits for such "orphan" or unassigned retirees under the Coal Act, Congress provided that responsibility for an operator's employees should be assumed by the operator's "related" entities, if the operator that employed the miners was no longer in a position to finance the Combined Fund premiums for its employees. 26 U.S.C. 9701(c)(2)(A), 9706(a). The design of this related-person liability provision—and a central purpose of the Coal Act—is that responsibility for a miner's health-care costs should remain, whenever possible, with the particular entities that have a connection, through the original signatory operator, to the individual miner, and not be shifted to the collective responsibility of all other operators who were in the NBCWA system, or to the public.

Congress, moreover, did not legislate in a vacuum. When Congress enacted the Coal Act in 1992, it acted against a background of well-developed case law in which the courts, including this Court, had addressed issues of liability and responsibility under federal labor, employment, and benefits statutes when a corporation leaves a line of business or dissolves and transfers its operations to a successor entity. As

we explain below (pp. 36-39, *infra*), the courts—starting with this Court's decisions recognizing successor responsibility under the National Labor Relations Act—had concluded that, in the closely regulated and worker-protective fields of labor, employment, and benefits law, obligations imposed on an employer by statute may properly devolve upon the employer's direct successor as well. The courts reached those conclusions, moreover, even in the absence of statutory language expressly providing for such successor responsibility. Given that settled legal background—and given the overarching purpose of the Coal Act to ensure that a signatory operator's obligations to the Combined Fund for its retirees are not foisted onto other entities with no historical tie to the signatory operator—Congress had every reason to expect that, if a signatory operator was defunct and no other related person could be found, the operator's direct successor in interest would become responsible for the operator's retired employees' health-care costs, and those costs would therefore not be transferred to other, unrelated operators, or to the public. At a minimum, nothing in the Coal Act prevented the Commissioner from drawing on those background principles of successorship law to determine that direct successors are appropriately made responsible for a signatory's Combined Fund premiums when no other related person is available. At the very least, the Commissioner's interpretation and application of the Act in these circumstances is reasonable and should be sustained by this Court.

### A. The Coal Act Provides That A Direct Successor In Interest Of A Signatory Operator May Be Made Responsible For The Health-Care Premiums For The Operator's Retired Employees

The court of appeals, in concluding that a direct successor in interest cannot be made responsible for the Combined



Fund premiums for a signatory employer's retired miners, did not doubt either that the courts have endorsed successorship responsibility in various contexts (see Pet. App. 35a n.7; pp. 36-39 *infra*), or that Congress had intended to prevent a shifting of responsibility for retired miners' health-care costs away from entities with a connection to the signatory operator to unrelated entities and the public fisc (Pet. App. 33a; pp. 29-30, *infra*), or that it would be at least "somewhat anomalous" to permit liability to be placed on the direct successor in interest of a related person to the signatory operator (which all agree may be done under the Coal Act), but not the direct successor of the operator itself (Pet. App. 34a; pp. 30-31, *infra*). Nonetheless, the court of appeals concluded that Congress had not in exact words made direct successors in interest of signatory operators responsible for their predecessor operators' Combined Fund premiums, and so, no matter how compelling such responsibility might be as a matter of congressional design, consistency with other principles of law, or logic, it could not be adopted. As we now show, the court of appeals' reading of the statute is flawed. Direct successor responsibility is consistent with the statutory language, and is far more in harmony with both the overall congressional design and background principles of successorship in the law than is the strange result reached by the court of appeals.

#### 1. *The Text Of The Coal Act*

a. The text of the "related person" provision of the Coal Act, 26 U.S.C. 9701(c)(2)(A), provides that responsibility for Coal Act premiums may be placed on direct successors in interest of signatory operators. Section 9706(a) provides that any Combined Fund beneficiary for which a signatory operator would be responsible may be assigned by the Commissioner to a "related person" to the signatory operator. Clauses (i), (ii), and (iii) of Section 9701(c)(2)(A) in turn set

forth three categories of persons and entities that "shall be considered to be a related person." One of those categories, for example, reaches any "member of the controlled group of corporations * * * which includes [the] signatory operator," 26 U.S.C. 9701(c)(2)(A)(i), and incorporates by reference the definition of "controlled group of corporations" in 26 U.S.C. 52(a). The last sentence of Section 9701(c)(2)(A) further provides that "[a] related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii)." 26 U.S.C. 9701(c)(2)(A). The referenced clauses (i), (ii) and (iii) all "describe" a family of businesses that are considered related to one another by an element of common ownership or control, and all expressly refer to the "signatory operator" as among the family.

A straightforward reading of these provisions leads to the conclusion that a "related person" includes a successor in interest of the signatory operator itself. As noted, the last sentence of Section 9701(c)(2)(A) states that the term "related person" "include[s]" a successor in interest of "any person described in clause (i), (ii), or (iii)." Clause (i) defines a "related person" to include any entity that is a member of the controlled group of corporations that includes the "signatory operator" itself. The signatory operator itself is thus "described" in clause (i) by virtue of that express reference alone. In addition, the signatory operator is necessarily a member of a controlled group of corporations that includes itself. That conclusion follows as a matter of logic: Corporation A is a member of the controlled group that includes corporations A, B, and C. Thus, "a successor in interest" of any entity described as a member of the group of corporations A, B, and C, includes a successor in interest of corporation A.

That reading of Section 9701(c)(2)(A) is bolstered by the treatment of "controlled group of corporations" in Section 52(a), to which Section 9701(c)(2)(A) refers. Section 52(a)



provides that, for certain purposes, "all employees of all corporations which are members of the same controlled group of corporations shall be treated as employed by a single employer." Section 52(a) is not intended merely to provide that (to use the example above) employees of corporation A may be treated as employees of B and C. As its expansive language demonstrates, it is fully consistent with treating employees of A as employees of A, should such treatment be appropriate in the particular context. See also 26 U.S.C. 9706(b)(1)(A) ("Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related person to such operator.").

b. The panel majority believed that the signatory operator itself cannot be one of the entities "described" in clauses (i), (ii), and (iii) of Section 9701(c)(2)(A), and therefore a successor in interest to the signatory operator cannot qualify under the final sentence of Section 9701(c)(2)(A). The panel reasoned (Pet. App. 24a-25a) that a signatory operator cannot be "described" in one of those three clauses because the purpose of those clauses is to define who may be a "related person to a signatory operator." Thus, the panel stated, "[b]ecause the persons *described* in those clauses are described in terms of their relationship to the signatory operator, it would seem evident that they cannot include the signatory itself. To suggest otherwise is tantamount to saying 'I am related to me.'" *Id.* at 25a (quoting *R.G. Johnson*, 172 F.3d at 894).

Contrary to the panel's conclusion, the "description" of persons in Section 9701(c)(2)(A) does not exclude the signatory operator itself. Rather, the signatory operator is expressly mentioned in all three clauses of that Section. While it is true that the general purpose of Section 9701(c)(2)(A) is to identify entities other than the signatory operator that may be responsible for the health-care benefits

of the operator's employees, the Section accomplishes that purpose by describing broad, related groups of entities that specifically include the signatory operator itself, as well as successors in interest to each of those entities. Section 9701(c)(2)(A) does not (as the court of appeals suggested) simply state that "A is related to A"; rather it provides that the persons that are related to one another include A and (if such exist) B and C, as well as any successors in interest of A, B, and C.

Nor was the court of appeals justified in concluding that the statute's reference to any person that is "described" in the separately enumerated clauses of Section 9701(c)(2)(A) somehow excludes the signatory operator. The word "describe" means, among other things, "express" or "set forth." *Black's Law Dictionary* 445 (6th ed. 1990). The term "signatory operator" is plainly "expressed" or "set forth" in each of the three enumerated clauses of Section 9701(c)(2)(A). Moreover, as we have explained, a signatory operator by definition is "a member of the controlled group of corporations * * * which includes such signatory operator," 26 U.S.C. 9701(c)(2)(A)(i). The original signatory is similarly among the entities "described" in clauses (ii) and (iii) of 26 U.S.C. 9701(c)(2)(A). It therefore follows that the last sentence of Section 9701(c)(2)(A), by authorizing assignments to successors in interest to the corporations thus "described," authorizes assignments to the signatory operator's own successor in interest.

### 2. *The Background, Legislative History, And Purposes Of The Coal Act*

a. The background, legislative history, and purposes of the Coal Act confirm that Congress intended that liability for a signatory operator's employees could be placed on the direct successor in interest of the signatory. As we have noted (pp. 3-4, *supra*), members of the Coal Commission



established by the Secretary of Labor to formulate recommendations for redressing the funding crisis in the 1950 and 1974 Benefit Plans observed, in the Commission's report to the Secretary, that the financial crisis facing the Plans had been caused in part by an industry practice of using corporate sales, mergers, and other similar transactions to avoid contractual obligations to finance retiree health care.

To ensure that such corporate transactions would not shield companies from statutory liability under the Coal Act, Congress imposed premium obligations on a purposefully broad and expansive class of persons "related" to the original signatory. An explanation of the legislation placed in the *Congressional Record* by Senator Wallop, one of the Coal Act's sponsors, made that point clear:

> [B]ecause of complex corporate structures which are often found in the coal industry, the number of entities made jointly and severally liable for a signatory operator's obligations under the definition of related persons is intentionally very broad.
>
> In this regard, the term "related person" is defined broadly to include companies related to the signatory operator. The Conference Agreement makes each such related person fully responsible for the signatory operator's obligation to provide benefits under the Act should the signatory no longer be in business, or otherwise fail to fulfill its obligations under the Act. Thus, the statute provides that related persons—meaning (i) those within the controlled group of corporations including the signatory operator, using a 50% common ownership test, (ii) a trade or business under common control with a signatory operator, (iii) one with a partnership interest or joint venture with the signatory operator, or (iv) *in specific instances successors to the collective bargaining agreement obligations of a signatory operator—are equally*

*obligated with the signatory operator to pay for continuing health care coverage.*

138 Cong. Rec. at 34,002 (emphasis added). In similar fashion, Senator Rockefeller, the principal sponsor of the Coal Act, explained on the floor of the Senate that the term "signatory operator" includes "a successor in interest of such operator." *Id.* at 34,033.[9] The views of these sponsors of the Coal Act are entitled to special weight (see, *e.g.*, *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-527 (1982)) and in this case confirm that the Act was intended to reach a broad range of entities, including a company that, like respondent Jericol, is the direct successor of a signatory operator that employed the pertinent beneficiaries.

On the other hand, to construe the related-person provision to exclude a signatory's direct successor in interest would be contrary to Congress's stated purposes of ensuring that each Combined Fund beneficiary's health-care costs is borne (if possible) by the person with the most direct responsibility for the beneficiary, and not by other signatory operators that had no connection with the beneficiary, or by the public fisc.[10] As Senator Wallop explained, the related-

[9] The provisions that became the Coal Act were added to energy legislation pending in the Senate as a floor amendment offered by Senator Rockefeller. See 138 Cong. Rec. at 20,117-20,122, 20,161-20,167. The ultimate version of the Coal Act was unchanged from that Rockefeller amendment.

[10] See Energy Policy Act, Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037 (congressional finding that "it is necessary * * * to identify persons most responsible for plan liabilities"), § 19142(b)(3), 106 Stat. 3037 (statement of congressional policy that benefits should be provided through "a privately financed self-sufficient program"); 138 Cong. Rec. at 34,001 (explanation by Sen. Wallop) (stating that conference committee had "rejected" the approach of a "government fund to administer the payment of benefits" and provided instead for "a privately financed and administered benefit plan structure").



person provision is intended "to insure that every reasonable effort is made to locate a responsible party to provide the benefits before the cost is passed to other signatory companies which have never had any connection to the individual," and its "overriding purpose is to find and designate a specific obligor for as many beneficiaries in the Plans as possible." 138 Cong. Rec. at 34,002. But in this case, if respondents were deemed not to be responsible for the retiree health-benefit obligations of Shackleford, the signatory operator, then responsibility for financing the health costs of Shackleford's former employees might fall on the public, because the beneficiaries' health-care costs would be financed by transfers from interest earned on the Department of the Interior's Abandoned Mine Reclamation Fund. See p. 8, *supra*. If transfers from that source are exhausted or for some other reason not available, then the beneficiaries' health-care costs would become the collective responsibility of all the other signatory operators, including those operators that had no relation to any entity that ever employed them. See *ibid.*

The exclusion of direct successors from liability would therefore create a statutory lacuna in which no specific company may be held responsible for a beneficiary's health-care costs, even in instances where the Commissioner determines that there is a coal mining company that substantially continued the signatory's coal operations, used the signatory's name and good will, assumed its obligations under the collective bargaining agreement, and retained many of its employees. As a result, successors would be relieved of statutory liability whenever they engaged in the very conduct Congress sought to remedy in the Coal Act: the purchase of coal mining assets through private contractual arrangements that dumped health-care costs on other parties while purporting to relieve both the original signatory and its succeeding purchaser of any obligation to fund

the benefits promised to the employees covered by the collective bargaining agreement.

b. The court of appeals declined to read the related-person provision to reach direct successors because it believed that the statutory language in Section 9701(c)(2)(A) clearly excluded such direct successors. See Pet. App. 31a. But as we have explained (pp. 23-26, *supra*), that language is at a minimum reasonably susceptible of an interpretation that comprises direct successors of signatory operators, even if, in isolation, it might also be read differently to reach only successors of other related persons, and not successors of the signatories themselves. The Court should therefore choose, from among permissible readings of the Coal Act's related-person provisions, the construction that effectuates Congress's "overriding purpose" (p. 29, *supra*) of avoiding a recurrence of the "orphan" retiree catastrophe of the last days of the Benefit Plans, which was caused in large part by operators avoiding responsibility for their beneficiaries by changing their corporate structures, selling assets, or ceasing operations. As this Court has stressed on numerous occasions, "in expounding a statute, [the Court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993); see also *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849). Quite recently, the Court reiterated that the object and purposes of a statute must inform its construction, especially when the language of the statute is amenable to more than one interpretation; even if the textual reading that more accurately captures congressional intent is the less common or natural one, it should nonetheless be preferred to a highly literal interpretation that contradicts "clear congressional policy." *Johnson* v. *United States*, 529 U.S. 694, 706 n.9 (2000). And the court of appeals' reading of Section



9701(c)(2)(A) has little to recommend it when evaluated against the fundamental objective of effectuating congressional intent.

Indeed, the court of appeals' construction of Section 9701(c)(2)(A) leads to the highly counter-intuitive result that a direct successor in interest of a signatory may *not* be made responsible for a signatory's beneficiaries—even though such successor liability would be supported by background principles of successorship (see pp. 36-39, *infra*)—while a more distantly related successor in interest of a corporate affiliate of a signatory operator may be made responsible for the signatory's beneficiaries—even though such liability is a substantial departure from traditional principles. For example, the court of appeals' reading of the statute would permit premiums to be imposed on the successor of a food processing company under common control with a sister company that mined coal and was a signatory operator; but at the same time, no liability would attach to a coal company that purchased all of the signatory's mining operations, used the signatory's name and employees, and assumed the signatory's collective bargaining obligations with the UMWA. There is no reason to believe that Congress could have intended to create such a strange distinction. Precisely because that result would be so unmoored from all indications of the congressional purpose underlying the Coal Act, the District of Columbia and Third Circuits rejected that reading and concluded that direct successors of signatory operators are to be considered related persons under the statute. See *R.G. Johnson*, 172 F.3d at 895; *Aloe Energy Corp.* v. *Apfel*, 225 F.3d 648 (3d Cir. 2000) (Table) (*reprinted at* 00-725 Pet. App. at 7a-8a), petition for cert. pending, No. 00-725.

The court of appeals in this case nonetheless stated that, although "[t]he Commissioner's reading of the statute may be appealing in terms of its logic, * * * we cannot adopt it

as our own without trespassing on a function reserved for the legislative branch." Pet. App. 35a. Respect for Congress's legislative function, however, does not require the Court to hew to a construction of the statute that yields peculiar results at odds with every other manifestation of congressional intent. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70-71 (1994) (rejecting the "most grammatical reading" of the statute, where it would lead to anomalous results); *United States* v. *Brown*, 333 U.S. 18, 27 (1948) ("No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences."); see also *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 135 (1995) (Ginsburg, J., concurring) ("It would show little respect for the legislature were courts to suppose that the lawmakers meant to enact an irrational scheme.").

The court of appeals also hazarded that Congress might have decided to exempt direct successors of signatory operators from responsibility for Coal Act premiums, even while making successors to related persons responsible, because "[a] major complaint lodged by the coal operators" during the last days of the Benefit Plans "was that they were being required to pay benefits for retired miners who never worked for them or maintained any other relationship with them." Pet. App. 33a. Thus, the court of appeals remarked, Congress might have believed that direct successors would similarly object to being responsible for their predecessor signatories' employees, and would not have supported the Coal Act if they had faced such responsibility. *Id.* at 33a-34a.

The court of appeals' suggestion, however, is the direct opposite of what was actually Congress's design in the Coal Act. Congress did indeed seek to prevent, to the extent possible, responsibility for a signatory's employees from being placed on coal operators that were totally unrelated to that signatory. Thus, Congress erected the three-tier structure in Section 9706(a) to ensure that any signatory operator that had employed a miner (or any related person to such a signatory operator) that remained in business would be assigned the miner before that miner was made the collective responsibility of all the remaining operators that had participated in the NBCWA system. See pp. 7-9, *supra*. But Congress did *not* perceive direct successors in interest to be "unrelated" to the original signatory operator—and therefore deserving of protection from liability under the Coal Act—just as it did not perceive other related persons and direct successors of related persons to be deserving of such protection. To the contrary, Congress deliberately defined "related person" very expansively, precisely so that other entities that had never had any affiliation or successorship relation with a signatory operator would not be made responsible for that signatory's employees.[11]



[11] The Coal Act's provision for related-person liability to the Combined Fund is broader than the analogous provision in the earlier version of the legislation that was vetoed by the President. See p. 5, note 2, *supra*; H.R. Conf. Rep. No. 461, 102d Cong., 2d Sess. 270-296 (1992). That earlier version would have imposed liability for a particular retiree's health-care costs on the "last signatory operator" that had signed a 1978 or later NBCWA, had been the last employer of the retiree, and remained in business, and would have relied on an industry-wide tax on coal production to finance collectively the health-care benefits of "orphan" retirees. See *id.* at 274-275 (proposed § 9704(g)(1) would have imposed premium on bituminous coal produced and imported; proposed § 9704(g)(1)(C) would have required premium for individual employees from "each last signatory operator"); *id.* at 286 (proposed § 9714(a) would have obligated "last signatory operator" to remain liable for any retiree then receiving health-care benefits, either though individual plan or new combined-fund plan, as long as it remained in business); *id.* at 294-295 (proposed § 9723(6)(A) defining "last signatory operator").

The earlier version of the legislation had a provision for "controlled group liability" with respect to any last signatory operator, which incorporated the "controlled group" principles of 26 U.S.C. 414(b). See H.R. Conf. Rep. No. 461, *supra*, at 288 (proposed § 9714(d) would have adopted

The court of appeals further suggested (Pet. App. 32a), based on Judge Randolph's dissent in *R.G. Johnson*, 172 F.3d at 895, that Congress might have wanted to facilitate the sale of coal companies to successors, and that, without an

controlled-group liability); *id.* at 294 (proposed § 9723(5)(B) would have used "controlled group" principles of Section 414(b)). When Congress abandoned the approach of a bituminous coal tax to finance orphan retirees' benefits, it at the same time expanded the responsibility of individual operators to finance the benefits of individual retirees, in part by adding the expansive related-person provision of Section 9701(c)(2)(A) (and also, in the third tier of Section 9706(a)(3), by extending liability to include signatory operators that had only signed NBCWAs executed before 1978). The related-person provision in Section 9701(c)(2)(A) as eventually enacted incorporates the broader controlled-group rules of 26 U.S.C. 52(a), which requires only 50% common stock ownership among corporations, not 80%, as does Section 414(b) (which incorporates by reference 26 U.S.C. 1563(a)). Thus, the rules for entities that may be deemed within the controlled group—and thus made responsible for an individual beneficiary's health-care costs—in the version of the Coal Act that was ultimately enacted are significantly broader than were the rules in the earlier, vetoed version.

It is also noteworthy that the earlier version of the legislation contained a definition of "last signatory operator" that specifically included "any successor" of a last signatory operator that was no longer in business. H.R. Conf. Rep. No. 461, *supra*, at 294-295 (proposed § 9723(6)(A)(i)(III)). Nothing in the background or legislative history of the Coal Act suggests that Congress intended, in the version that was ultimately enacted, to draw back from this direct-successor liability. To the contrary, as we have explained in this footnote, the version that was ultimately enacted made the rules for individual company responsibility to the Combined Fund significantly broader than in the vetoed version. As we have also explained in the text, Section 9701(c)(2)(A), properly construed, specifically includes the successor in interest of the signatory itself among the successors and related persons that are responsible for the signatory's retiree health-benefits liability. See also 26 U.S.C. 9711(g)(1) (defining "last signatory operator" to include successors for purposes of continuing contractual liability to individual employer plans and statutory liability to 1992 Plan).



exemption from responsibility for successors of signatories, prospective purchasers could never be sure of their potential liability for Combined Fund premiums. As an initial matter, however, it is difficult to see what any congressional policy (even if such existed, which it did not, see pp. 35-36, *infra*) of promoting the sale of coal companies *in the future* could have to do with determining whether a direct successor might be made responsible for the employees of a signatory operator that had *already* gone out of business. The Commissioner's "related party" determinations are based on relationships among entities as of July 20, 1992, or earlier—before the Coal Act was enacted. See 26 U.S.C. 9701(c)(2)(B). Thus, any purchase and sale that were supposedly to be promoted by the Coal Act would have already occurred when that statute became law.

Moreover, as Judge Murnaghan pointed out in dissent, the majority's speculation about Congress's purpose cannot be sustained in any event because it "presumes that Congress intended to promote the exact practice that necessitated legislative action in the first place." Pet. App. 42a. It was in large part signatories' practice of selling their operations to other companies that were not parties to the NBCWAs that led to the financial crisis that plagued the pre-Coal Act Benefit Plans.[12] As Judge Murnaghan observed (*ibid.*), "it is unimaginable that Congress could have intended to promote the sale of coal companies to successors who would not be liable for Fund benefits." In addition, the court of appeals' suggestion offers no explanation as to why Congress would

[12] Indeed, Congress anticipated and specifically guarded against the possibility that signatories might try to dump their employees while the Coal Act was being framed. Thus, in Section 9701(c)(2)(B), Congress provided that the "related party" determinations should be made as of July 20, 1992 (or earlier, if as of that date the signatory operator was no longer then in business)—three months before the Act's date of enactment, October 24, 1992 (see 106 Stat. 2776).

not have had the same concern about successors in interest of related persons, who indisputably may be liable for Combined Fund premiums under the final sentence of Section 9701(c)(2)(A). Thus, the speculation by the panel majority fails to provide any persuasive basis for the distinction, created by the majority's reading of Section 9701(c)(2)(A), between direct successors of signatory operators and successors of related persons to signatory operators.

### 3. *Background Principles Of Successorship Informing The Text*

The Commissioner's construction of the Coal Act as including successors in interest of signatory operators among the entities that may be financially responsible for the signatory's employees is supported by the relevant legal background against which Congress legislated—in particular, the courts' (including this Court's) treatment of successorship issues in other labor, employment, and benefits statutes. Before Congress enacted the Coal Act in 1992, the courts had ruled in a variety of contexts that a corporate entity's liability under a statutory scheme should be attributed to the entity's direct successor in interest, even absent language specifically providing for such successorship liability.[13] In light of those background principles, Congress had every reason to expect that responsibility for a signatory operator's employees under the Coal Act would devolve on the signatory's direct successor in interest, if the signatory itself was defunct and no other related person could be

[13] That background of judicial endorsement of successorship liability is also consistent with Congress's express directive in the Dictionary Act that a statutory reference to a company or association "shall be deemed to embrace the words 'successors and assigns of such company or association,' in like manner as if these last-named words, or words of similar import, were expressed." 1 U.S.C. 5.



found. Indeed, that would have been the most sensible application of the Coal Act even if Congress had not addressed successors in Section 9701(c)(2)(A) at all.

Before 1992, this Court had held in a series of decisions that the National Labor Relations Board was authorized to hold a successor responsible for labor-law obligations of its predecessor. In *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 41 (1987), the Court held that a successor employer has a continuing duty to bargain with the union certified during the predecessor employer's operation of the workplace, where the majority of the successor's employees were employed by the predecessor. In *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 181-185 (1973), the Court similarly ruled that the National Labor Relations Act, the NLRB was authorized to impose a reinstatement and back pay order as a remedy for an unfair labor practice on the bona fide successor to the employer that had engaged in the unfair labor practice, and also held (*id.* at 182 & n.5) that such successorship liability was proper even if (as in this case) the successor had purchased the assets of the predecessor, rather than succeeding to it by formal merger or consolidation. And in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), the Court held that the successor in that case was bound by the duty to arbitrate assumed by its predecessor under a collective bargaining agreement.[14]

[14] In two labor-law cases, this Court has held that a successor was not bound by obligations of its predecessor. In *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the Court held that, although the successor was bound by the statutory obligation under the NLRA to bargain in good faith with the union that had recently been recognized in a certification election as the representative of the employees of the predecessor corporation (*id.* at 278), the NLRB could not require the successor to be bound by the substantive terms of the collective-bargaining agreement signed by its predecessor and the union (*id.* at 281-291). In reaching the latter conclusion, the Court stressed that the NLRB

The lower courts have reached similar conclusions about successor responsibility in construing other labor, employment, and benefits statutes that are designed to protect the interests of employees. In cases involving successor employers' obligations to make payments to multiemployer pension plans, the courts have concluded that a successor may be held liable for a predecessor's contribution obligations and withdrawal liability to a plan.[15] Those precedents are especially significant here, for Congress specified in the Coal Act that the Combined Fund shall be a multiemployer plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA) (see 26 U.S.C.

had no authority to dictate the substance of a collective-bargaining agreement, and that the NLRA deliberately left to the parties the freedom to reach contractual arrangements that they believed to be in their own best interest. See *id.* at 283-287. No such overriding statutory policy of freedom of contract is implicated in this case, and this case does not in any event involve the imposition of contractual responsibility on a successor. We do note, however, that in this case, the successor corporation voluntarily assumed the contractual obligations of the signatory operator, including those under the collective bargaining agreement. J.A. 23, 26.

In *Howard Johnson Co.* v. *Detroit Local Joint Executive Board*, 417 U.S. 249 (1974), the Court ruled that a successor employer was not bound by the duty to arbitrate assumed by its predecessor. That ruling, however, was based on the conclusion that there was no "substantial continuity of identity in the business enterprise" before and after the change in ownership, *id.* at 263, and thus that the latter owner was not a true successor to the former, such that the former's obligations could be transferred to it. That ruling also has no application to this case, which does involve a substantial continuity in business operations between the predecessor and successor operators. See p. 12, *supra*.

[15] See *Upholsterers' Int'l Union Pension Fund* v. *Artistic Furniture of Pontiac*, 920 F.2d 1323, 1329 (7th Cir. 1990); *Hawaii Carpenters Trust Funds* v. *Waiola Carpenter Shop, Inc.*, 823 F.2d 289, 293-294 (9th Cir. 1987); see also *Chicago Truck Drivers Union (Indep.) Pension Fund* v. *Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995).



9702(a)(3)(C)), and that Section 4301 of ERISA, 29 U.S.C. 1451, which provides for suits to enforce the multiemployer liability provisions of ERISA, "shall apply to any claim arising out of an obligation to pay an amount required to be paid [under the Coal Act] in the same manner as any claim arising out of an obligation to pay withdrawal liability" under ERISA (see 26 U.S.C. 9721). Courts have also held, in various contexts, that a successor corporation is responsible for obligations imposed on the predecessor under Title VII of the Civil Rights Act of 1964,[16] 42 U.S.C. 1981,[17] the Age Discrimination in Employment Act of 1967,[18] and the Fair Labor Standards Act of 1938.[19]

Congress is presumed to have been aware of this precedent endorsing successor liability when it enacted the Coal Act. See *United States* v. *Wells*, 519 U.S. 482, 495 (1997). The most reasonable construction of the Coal Act, therefore, is that Congress fully anticipated that direct successors in interest of signatory operators could be held responsible for the benefits of the signatories' own employees. Indeed, in light of the courts' similar treatment of successorship in other employment-regulation statutes, that would have been true even if Congress had not inserted any

[16] See *EEOC* v. *Vucitech*, 842 F.2d 936, 944-946 (7th Cir. 1988) (successor liable under Title VII for sex discrimination claim against predecessor); *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974) (similar; race discrimination claim under Title VII); see also *Bates* v. *Pacific Mar. Ass'n*, 744 F.2d 705, 707-709 (9th Cir. 1984) (Kennedy, J.) (successor bound by Title VII consent decree to which predecessor had agreed).

[17] See *Musikiwamba* v. *ESSI, Inc.*, 760 F.2d 740, 745-750 (7th Cir. 1985).

[18] See *Criswell* v. *Delta Air Lines, Inc.*, 868 F.2d 1093, 1094 (9th Cir.), cert. denied, 489 U.S. 1066 (1989).

[19] See *Steinbach* v. *Hubbard*, 51 F.3d 843, 845-846 (9th Cir. 1995).

language in the Coal Act specifically addressing successor liability.

**B. Even If The Coal Act Did Not Itself Affirmatively Provide That Responsibility For Combined Fund Premiums May Be Imposed On A Signatory's Direct Successor, The Commissioner's Determination That Successors May Be Responsible For Combined Fund Premiums Would Be Reasonable**

Even if the Court were to conclude that the Coal Act does not itself affirmatively provide that a signatory's direct successor may be made responsible for signatory's retired employees, it certainly does not expressly exclude that possibility. And in light of the considerations discussed above—the financial crisis in the Benefit Plans that led to passage of the Coal Act, Congress's intent to place liability for retirees' premiums on entities connected to the signatory that employed the miners rather than the public or the collective responsibility of all other signatory operators, and the background principles of successorship against which Congress legislated—it was reasonable for the Commissioner to conclude that direct successors of a signatory operator should be responsible for the operator's employees, when the operator is defunct and no other related person is available.

***1. The Commissioner's Authority Under The Act***

Section 9701(c)(2)(A) states that, "[i]n general," the Commissioner "shall * * * consider[]" to be related persons certain companies under common ownership or control with the signatory operator. That Section further provides, in the closing sentence, that a related person "shall also include" a successor in interest to any person "described" in clauses (i) through (iii) of that Section. Even if the Court were to conclude, contrary to our submission in Point A, that the signatory operator itself is not "described" in clauses (i), (ii),



and (iii) of Section 9701(c)(2)(A), and thus that the direct successor of the signatory is not in terms covered by the final sentence of Section 9701(c)(2)(A), the text of Section 9701(c)(2)(A) nonetheless does not preclude the Commissioner from assigning beneficiaries to such a successor. Section 9701(c)(2)(A) expressly sets forth the entities that the Commissioner *must* "include" as related persons under successorship principles, but it does not prohibit the Commissioner from "including" other companies that are also connected to the signatory operator by successorship.

Congress's use of the word "include" in the last sentence of Section 9701(c)(2)(A), introducing the principle of successorship, signifies that the entities expressly made liable in the statute by successorship principles are not exclusive, and that the Commissioner has authority to treat as successors other companies not expressly set forth in the statutory text. The statutory term "include," when used in a definitional provision, is commonly employed in a non-exclusive sense, to "import[] a general class, some of whose particular instances are those specified in the definition." *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934).[20]

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[20] See also *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 n.9 (1978); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 769 F.2d 13, 17 (1st Cir. 1985), aff'd, 479 U.S. 238 (1986); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.07, at 231 (rev. ed. 2000) ("It has been said 'the word "includes" is usually a term of enlargement, and not of limitation. . . . It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated. . . .'"). The same is true of the close cognate term "including." "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); see also *Puerto Rico Mar. Shipping Auth.* v. *ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 431-432 (2d ed. 1995) (noting that the term "including" "should not be used to introduce an exhaustive list, for it implies that the list is only partial").

That inference is particularly strong when a statute uses *both* "includes" and "means" to express the reach of statutory terms, as the Coal Act does.[21] Unlike the word "includes," the term "means" generally does imply an exhaustive definition.[22] Congress's use of "include[s]" in Section 9701(c)(2)(A) to introduce the principle of successorship, in close proximity with its use of "means" elsewhere in the Coal Act, indicates that the final sentence of Section 9701(c)(2)(A) does not exhaust the range of entities that the Commissioner may reasonably make responsible for a signatory's employees under successorship principles.

At the same time, Congress may well have expressly provided in Section 9701(c)(2)(A) for liability of successors in interest of "related persons" to signatory operators (such as successors of corporate affiliates) because (unlike the background principle of successorship liability discussed at pp. 36-39, *supra*), that more remote related-person and successor liability is not firmly established in the case law. Indeed, the Coal Act substantially departed from settled common law principles by extending liability for signatory operators' employees to other corporate entities that are merely related to the signatory operator through common

[21] The related-person provision of Section 9701(c)(2)(A) is one of several statutory terms defined in a statutory section entitled "Definitions of general applicability" (26 U.S.C. 9701). Most of the other definitions in Section 9701 state what a statutory term "means," indicating a congressional intent to set forth in the text of the statute a comprehensive definition of the term in question. See, *e.g.*, 26 U.S.C. 9701(c)(1) (stating that the term "signatory operator" "means a person which is or was a signatory to a coal wage agreement").

[22] See *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 & n.15 (1977); 2A Norman J. Singer, *supra*, § 47:07, at 231 ("A term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means.'").



ownership or control, without any requirement of a showing that the related entity either was directly involved in the signatory's operations or was used to perpetrate fraud.[23] Given that statutory departure from common law principles, the Commissioner and the courts, without express direction from Congress, might well have declined to extend liability even further, to successors in interest of entities that were merely related persons to the signatory operator. But, as we have explained, in light of the state of the law at the time the Coal Act was enacted, extending liability to the direct successor in interest of the signatory operator itself would not have involved an innovation in the law.

Especially against that background, the fact that the statute expressly makes successors to other "related persons" such as affiliate corporations liable for Combined Fund premiums does not give rise to a negative inference that any other kind of successor is necessarily shielded from liability. While it is often true that "an express statutory requirement" in one provision, "contrasted with statutory silence" in another provision, "shows an intent to confine the requirement to the specified instance" (*Field* v. *Mans*, 516 U.S. 59, 67 (1995)), that "negative pregnant argument should not be elevated to the level of interpretive trump card" (*ibid.*) where, as here, it "suggests results strangely at odds

[23] See generally *Fletcher Cyclopedia of the Law of Private Corporations* § 43, at 711-718 (West 1999) (discussing limited circumstances in which separate-entity status of parent and subsidiary or affiliate corporations will be disregarded, and explaining (at 718) that "there can be no piercing of the veil without a showing of improper conduct"); see also *Cedric Kushner Promotions, Ltd.* v. *King*, No. 00-549 (June 11, 2001), slip op. 5 (observing that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges" separate from those of its creators); *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998) (discussing "bedrock principle" that a parent corporation is not liable for its subsidiary's acts).

with other textual pointers" (*id.* at 75) and would lead to results at which "common sense would balk" (*id.* at 68). In this case, mechanical application of a "negative-pregnant" rule would indeed yield strange results, for it would shield from liability direct successors in interest of a signatory operator, while placing responsibility on statutorily enumerated businesses (successors of entities that were under common control with the signatory) that are more distantly related to the signatory operator. The more logical reading of the statute is that Congress expressly directed that those more distantly related successor companies be included, not to foreclose reaching other, more proximate successors, but rather to ensure that the Commissioner would apply the sort of successorship liability that is well settled for direct successors of the predecessor corporation itself to situations involving successors of corporations that, though not the predecessor itself, are within the family of corporations that includes the predecessor. Congress thus simply confirmed the Commissioner's power to apply successorship liability broadly in light of the overarching objective of keeping the number of unassigned beneficiaries to "an absolute minimum," 138 Cong. Rec. at 34,003 (explanation by Sen. Wallop) without in any way restricting the Commissioner's authority to rely on background principles to place responsbility on the direct successors of the signatory operator itself.

### 2. *The Reasonableness Of The Commissioner's Determination*

The Commissioner's determination that a direct successor of a signatory operator should be responsible for the Combined Fund premiums of the signatory's employees when the signatory itself (along with all other related persons) is defunct, is reasonable and consistent with the purposes and design of the Coal Act. That determination should therefore be upheld as a reasonable exercise of the Commissioner's



authority to construe and administer the statute. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984).[24]

First, as we have explained (pp. 36-39, *supra*), Congress enacted the Coal Act against a background of decisional law that had adopted direct-successorship responsibility in a broad variety of contexts in labor, employment, and benefits statutes, specifically including employer liability to multiemployer ERISA plans. Therefore, even if Congress did not expressly speak to the matter of direct successorship in the final sentence of Section 9701(c)(2)(A), it is reasonable for the Commissioner to apply those well-settled background principles in the context of the Coal Act. Nothing in the text or design of the Coal Act or Congress's purposes in enacting it suggests that Congress would have intended to *exclude* such direct successors from liability or to prevent the Commissioner from employing those principles—just as in *Fall River Dyeing*, this Court found nothing in the text, design, or purposes of the NLRA to prevent the NLRB from applying those principles of successorship to hold a successor employer to the predecessor's duty to bargain in good faith with a duly certified union that retains a presumption of majority support. See 482 U.S. at 40-41; pp. 36-37, *supra*.

To the contrary, the crisis in the NBCWA system that led Congress to enact the Coal Act was precipitated in large part by transactions like the one at issue in this case. The

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[24] The Coal Act presents a situation, where Congress has "expect[ed] the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," such that *Chevron* deference is appropriate. See *United States* v. *Mead Corp.*, No. 99-1434 (June 18, 2001), slip op. 9. The Commissioner's assignments of beneficiaries are similar to other agency adjudications that have previously been granted *Chevron* deference. See *id.* at 11 (discussing *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995)).

NBCWAs governing the terms of labor in the coal industry created in mine workers an expectation that signatory employers would contribute to maintaining health-care benefits for current retirees, and that the Benefit Plans would continue to provide comparable health-care benefits for current employees when they in turn retired. Many employers, however, dissolved their corporate structures and transferred their operating assets to other parties without making any further provision for the benefits that would eventually be claimed by their workers. As a result, the increasingly expensive responsibility for those employers' "orphan" retirees was "dumped" on the fewer and fewer mine operators that remained in business and remained within the NBCWA structure. See pp. 3-4, *supra*. The Commissioner's interpretation of the Coal Act liability to include a signatory's direct successor advances Congress's objective of ensuring that that situation is not reenacted, *i.e.*, that responsibility for retirees' health-care benefits is not foisted on other businesses with no connection to the retired beneficiaries—or on the public. See pp. 5, 27-28, *supra*.

Second, the principles adopted by the Commissioner for determining who will be considered a successor in interest to a signatory operator are reasonable. The Commissioner's Program Instructions emphasize the importance of the employment relationship in assigning statutory liability. Those Instructions provide that the signatory's direct successor in interest may be assigned premium obligations only as a "last resort," when the employing signatory is defunct, and when no affiliated company under common ownership or control with the signatory is in existence. See Supplemental Coal Act Review Instructions No. 4, § D (2) and (3) (Pet. App. 86a-87a). Thus, in a third-tier assignment like this one, the signatory's successor is assigned liability only when the employing signatory or an affiliated company cannot be found, and when the only alternative to imposing liability on



the signatory's successor would be to transfer benefit costs to the public fisc (the Abandoned Mine Reclamation Fund) or the collective responsibility of all other signatory operators, none of which had any relationship with the employees.

Third, the Commissioner's guidelines vindicate Congress's objective of ensuring that a signatory and its successor not be permitted to use private contractual arrangements to shield both parties from any further obligation to fund retirees' benefits. Successorship transactions that purported to relieve both the seller and the purchaser from any further obligation to fund retirement benefits were cited by the Coal Commission as a contributing cause of the financial crisis in the UMWA Benefit Plans and the resulting need for congressional intervention. See pp. 3-4, *supra*. The legislative history accordingly notes that related-person liability was to be construed broadly, so as to reach "successors to the collective bargaining agreement obligations of a signatory operator." 138 Cong. Rec. at 34,002 (explanation by Sen. Wallop). In concluding that the direct successor of a defunct signatory may be responsible for the signatory's liabilities under the Act, the Commissioner has construed the Act to remedy the very industry practice Congress intended to redress.

Fourth, the successorship principles applied by the Commissioner ensure that liability is confined to instances in which the successor bears a close nexus to the employment relationships and collective bargaining obligations of a now-defunct signatory, and may therefore reasonably be deemed the most responsible, extant party. The Commissioner assigns beneficiaries to a defunct signatory's successor only where the successor acquires substantial assets through purchase, merger, or similar transaction, where the successor continues running the same operation in the same location with little or no interruption in business, and where the successor uses many of the same employees who worked for

the former owner. Pet. App. 86a. The Commissioner thus applies to each assignment determination interpretive principles that limit liability to instances in which the successor has substantially continued the same business operation with most of the same employees as the employing signatory.

The court of appeals reasoned, however, that even those criteria were not sufficient to make a successor the party "most responsible" for funding the continued provision of retirees' benefits. The court noted that respondent Jericol had never actually employed the pertinent miners, and that any benefits conferred by the retired miners through their labor ran to their employer, the original Shackleford company and those in financial partnership with it, and thus did not inure to the benefit of an arm's-length purchaser of assets such as Jericol. Pet. App. 29a. The fact that the successor is not the actual employer of particular retired beneficiaries at issue, however, cannot be dispositive. While the employer may indeed bear a closer nexus to the funding problems that beset the industry's multiemployer benefit plans, the Coal Act funding scheme was enacted precisely because many such employers were out of business and could not be reached. Congress, in authorizing the imposition of related-person liability on a broad range of companies other than the signatory operator, made clear in the Act itself that premiums may be imposed on certain companies even if the specific assignee never had a direct and immediate employment relationship with the pertinent beneficiaries.

For all the foregoing reasons, the Commissioner's determination that a direct successor of a signatory operator may be made responsible for the Combined Fund premium obligations attributable to the signatory operator's employees is reasonable and consistent with the statute. The court of appeals' contrary ruling should therefore be set aside.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 2001

## APPENDIX

Section 9701(c) of Title 26, United States Code, provides in pertinent part:

**(c) Terms relating to operators**

For purposes of this section—

* * * * *

**(2) Related persons**

**(A) In general**

A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of [26 U.S.C. 52(a)]) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under [26 U.S.C. 52(b)]) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 00-1307

# In The Supreme Court of the United States

**LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY,**

***Petitioner,***

**v.**

**SIGMON COAL COMPANY, INC. AND JERICOL MINING, INC.,**

***Respondents.***

**On a *Writ* of *Certiorari* to the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR THE RESPONDENTS

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## QUESTION PRESENTED

Whether the Commissioner of Social Security violates Section 9701(c)(2) of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701(c)(2), by assigning beneficiaries in the UMWA Combined Benefit Fund to the successor in interest of the signatory operator that actually employed the beneficiaries.

## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The caption of the case contains the names of all the parties. Respondents, Sigmon Coal Company and Jericol Mining, Inc., have no parent of subsidiary corporations that require disclosure under Supreme Court Rule 29.6.



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No. 00-1307

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# In the Supreme Court of the United States

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LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY,
Petitioner,
v.
SIGMON COAL COMPANY, INC. AND JERICOL MINING, INC.,
Respondents.

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## BRIEF FOR THE RESPONDENTS

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## STATEMENT

### A. Events Leading To The Enactment Of The Coal Industry Retiree Health Benefit Act of 1992

1. Beginning in 1950 the United Mine Workers of America (UMWA) and coal operators entered into a series of National Bituminous Coal Wage Agreements (NBCWA) which established the UMWA Welfare and Retirement Fund of 1950 (1950 Fund). At this time the UMWA represented

approximately 80% of bituminous coal production. *See* Secretary of Labor's Advisory Comm'n on United Mine Workers of America Retiree Health Benefits, *Coal Commission Report* 2 (Nov. 1990) [hereinafter Coal Comm. Rpt.]; *see also Eastern Enters. v. Apfel*, 524 U.S. 498, 506-508 (1998). The 1950 Fund compensated miners and their dependants and survivors for disability, death or retirement, as well as the medical expenses of miners and their dependents. The 1950 NBCWA established a tonnage royalty which the operators paid into the 1950 Fund. Three trustees managed the 1950 Fund. They determined coverage and eligibility, priorities among classes of beneficiaries, amounts of benefits, and all other related matters, consistent with the funds available. The 1950 Fund did not guarantee benefits to any category of beneficiaries, including retirees or their dependents.

2. Between 1950 and 1974, the trustees often altered the level of benefits according to the 1950 Fund's budget. If declining coal production reduced contributions, benefits were reduced. For example, from 1962 to 1966, health cards were taken from the employees of companies with delinquent contributions. Although the 1950 NBCWA was amended between 1950 and 1974, except for increases in the amount of royalty payments, the terms and structure of the 1950 Fund remained essentially unchanged. 524 U.S. at 506.

From 1950 to 1974, the 1950 Fund was the exclusive source of health, pension and other welfare benefits for all active, laid off, disabled and retired UMWA miners and their dependents. During this period, an employer's sole obligation was to pay the tonnage rate specified in the NBCWA. This



pay-as-you-go system was in place when the transaction giving rise to this action occurred in 1973.

3. Shackleford Coal Company (Shackleford), a family owned company, began mining and processing coal in eastern Kentucky in 1963. Joint Appendix at 70 ¶ 2 [hereinafter J.A.]. Based on information developed by the Social Security Administration (SSA or Commissioner), we now know that, of the miners who worked for Shackleford between 1963 and 1973, at least 86 eventually received a UMWA pension.[1] On June 1, 1973, Shackleford sold its mine to Irdell Mining, Inc. (Irdell). J.A. at 83. At the time of the sale Shackleford was signatory to the 1971 NBCWA. *Id.* at 70 ¶ 4. After the sale Shackleford's stockholders changed its name and, shortly thereafter, dissolved the corporation. Pet. Appdx. at 69a.

4. Charles and James Sigmon and Fred Langley formed Irdell in 1973 to acquire Shackleford's assets. *Id.* at 10a. There was no common ownership between Irdell and Shackleford. *Id.*; J.A. at 68 ¶¶ 9-11, 74 ¶¶ 3-4. Irdell purchased most of Shackleford's operating assets, coal inventory, supplies, leases and contracts, and assumed responsibility for Shackleford's collective bargaining agreement. J.A. at 20-43; Pet. Appdx. at 10a, 69a. Otherwise, Irdell did not assume Shackleford's liabilities. Pet. Appdx. at 10a. Irdell paid approximately $2.6

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[1] Petitioner's Appendix to Petition for a Writ of Certiorari at 11a [hereinafter Pet. Appdx.]. Due to the nature of coal mining, miners often work for numerous employers. Thus, these miners likely worked for other coal companies as well. *See, e.g.*, J.A. at 107-109 (listing six distinct coal companies beginning in 1946 as having employed UMWA retiree John Thomas, the last being Shackleford in 1970).

million for Shackleford's assets, which was "fair market value," J.A. at 67-68 ¶ 6, and thereafter made a substantial capital investment and expanded the mine, *id.* at 72 ¶ 11. After the purchase, Irdell changed its name, operating as Shackleford Coal Company (which it was permitted to do pursuant to the asset purchase agreement) until 1977 when it changed its name to Jericol Mining, Inc. (Jericol).[2] Pet. Appdx. at 10a -11a. Under the terms of the 1971 NBCWA, Jericol was required to pay the specified tonnage royalty to the 1950 Fund. The 1950 Fund, in turn, provided health, retirement and other welfare benefits to Jericol's miners.

5. For the coal industry the 1970s was characterized by the rapid growth of coal mining nationally, significant changes in health, safety and environmental regulations, and the entry into the workforce of a new generation of coal miners. Coal Comm. Rpt. at 23. The Employee Retirement Income and Security Act of 1974 (ERISA) imposed significant new burdens on the 1950 Fund, and a court decision extended pension eligibility to about 19,000 retirees. *Id.* at 24. 1974 negotiations took place against a background of rising production and record prices in the coal industry. *See* Charles R. Perry, *Collective Bargaining and the Decline of the United Mine Workers* 207 (Indus. Research Unit, The Wharton School, Univ. of Pa. No. 60, 1984) [hereinafter Perry]. The Bituminous Coal Operators Association (BCOA), a multi-employer bargaining group,

[2] To avoid confusion all references to "Shackleford" refer to the company that sold its asset in 1973. All references to the company that purchased Shackleford's assets are to "Jericol."



agreed to the most generous contract in its history, increasing wages and benefits an estimated 45%. Perry at 128-129, 143.

To satisfy ERISA requirements the UMWA and the BCOA restructured the 1950 Fund, dividing it into separate pension and benefit plans called the UMWA 1950 Pension Plan (1950 Pension Plan) and the UMWA 1950 Benefit Plan (1950 Benefit Plan). Eligibility for the 1950 Plan was restricted to miners who retired in or before 1975. Coal Comm. Rpt. at 30. They also created the UMWA 1974 Pension Plan (1974 Pension Plan) and the UMWA 1974 Benefit Plan (1974 Benefit Plan) to provide pension and health benefits for miners who worked after 1975. *Id.* The 1974 NBCWA continued to require a fixed royalty amount, with all health and retirement benefits provided by the new UMWA Plans.

The share of total tonnage mined by NBCWA signatories declined sharply during the 1970s as new investors came into the coal industry. *Id.* at 24. The 1950 and 1974 Benefit Plans encountered financial problems as benefits increased, the amount of coal produced declined, a generation of miners retired, and health care costs escalated rapidly. 524 U.S. at 510; Coal Comm. Rpt. at 2. Jericol, which had been a signatory to the 1974 NBCWA, J.A. at 72 ¶ 11, refused to sign the 1978 NBCWA. Jericol and its employees ended their relationship with the UMWA in 1977 and had no connection with the UMWA Plans after 1977, or with the events that later led to the demise of the Plans.

6. In the 1978 NBCWA, signatories assumed the responsibility to provide health care for their active miners, as well as their 1974 Pension Plan pensioners (miners who retired after 1975) through individual company plans. Coal Comm.

Rpt. at 26, 30. Miners who retired prior to 1976 (including Shackleford's retirees) were not affected by this change; and their health care continued to be provided by the 1950 Benefit Plan. The 1974 Benefit Plan remained in existence, but only to provide benefits to miners who retired after 1975, and who would otherwise have lost coverage because their former employer went out of business or ceased to be signatory to a NBCWA. 524 U.S. at 509.

7. By the early 1980s, NBCWA percentage of coal production slipped from the 80% of the 1950s to 40%. As a result of high labor costs, many 1978 NBCWA signatories exited the industry or opened non-union mines. Coal Comm. Rpt. at 27; Nonna A. Noto, *Coal Industry: Use of Abandoned Mine Reclamation Fund Monies for UMWA "Orphan Retiree" Health Benefits* (Congressional Research Service Report for Congress, Sept. 10, 1992), *reprinted in* 138 Cong. Rec. S17606 [hereinafter CRS Rpt.]. By 1990, the 1950 and 1974 Benefit Plans faced a deficit of about $110 million, and obligations to beneficiaries continued to surpass revenues. 524 U.S. at 511. By September 1990, the NBCWA companies were contributing $3.96 per man hour to the UMWA Benefit Plans. Coal Comm. Rpt. at 95.

8. Responding to a lengthy strike against Pittston Coal Company, in 1990 Labor Secretary Elizabeth Dole created the Coal Commission. She charged it with recommending a solution for ensuring that UMWA retirees would continue to receive promised health care. 524 U.S. at 511. The Coal Commission projected that the Benefit Plans' deficit would exceed $300 million by 1993. Coal Comm. Rpt. at 3. Factors contributing to the deficit included health care inflation, a



precipitous decline in employment levels and mine closings, and a declining base of contributing companies. *Id.* at 42. The Coal Commission proposed alternative funding plans for the consideration of Congress: (i) a fund financed by an industry-wide fee to cover the orphans with a separate fund to be financed by signatories to the 1978 - 1988 NBCWAs who remained in business to cover the cost of employees who retired from those companies, or (ii) spread the cost of the retirees' health benefits across a broadened base of current and former signatory employers (apparently limited to employers that signed the 1978 - 1988 NBCWAs).

**B. Congressional Intervention and the Coal Act**

1. In devising a means for ensuring the continuation of UMWA retiree health benefits, Congress confronted many competing interests. 524 U.S. at 512-13. The UMWA wanted to avoid a loss of benefits. Signatories to the 1988 NBCWA wanted relief from the financial burden of the Benefit Plans. Employers that had negotiated out of the Benefit Plans strongly opposed any abrogation of their contracts. Non-union coal companies vehemently rejected any solution requiring them to finance UMWA retirees' health care. Some commentators thought that the problem was a private contract matter and questioned whether a legislated solution was appropriate.[3]

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[3] *See* Coal Comm. Rpt. at 81-87 (statements of Commissioners Richard Holsten, et al.); Herbert R. Northrup, *Taxing Nonsignatory Companies to Pay for Collective-Bargaining Benefits Costs: The Coal Mine Proposal*, 5, No. 1 Benefits L.J. 103, 104 (Spring 1992) [hereinafter Northrup].

2. The legislative history reflects the difficulty in satisfying these competing interests. The Act's "complex and arduous history" led Congress to a solution which "best accommodate[d] the legitimate concerns of the many interested parties." 138 Cong. Rec. S17603, 604 (daily ed. Oct. 8, 1992) (technical explanation of the Coal Act inserted into the *Congressional Record*). Senator Liebermann described the Act as a "compromise provision on coal industry retiree health benefits which balances the needs of the . . . [UMWA] retirees and the interests of domestic and foreign coal companies." 138 Cong. Rec. S10786 (daily ed. July 29, 1992). He also noted that crafting the Act was difficult "because of the divergent interests among all the parties involved – union and nonunion coal companies, western and eastern coal companies, those who signed the 1988 [NBCWA] and those who have separate agreements with the UMWA." *Id.* Senator Rockefeller reiterated: "[l]engthy and difficult negotiations were required because of the myriad of conflicting interests in our nationwide coal industry. . . . The current approach is the one . . . most likely to command a consensus in the legislative process." 138 Cong. Rec. S10783 (daily ed. July 29, 1992).

3. Between 1989 and July 1992, Congress considered a number of proposals to fund health benefits for UMWA retirees.[4] The Coal Act is the product of substantial legislative

[4] For a detailed history of the legislative proposals that preceded the UMWA financing scheme ultimately enacted see CRS Rpt. at 138 Cong. Rec. S17611-12 (daily ed. Oct. 8 1992) (Appendix 3). *See also* Brief of *Amicus Curiae* R.G. Johnson Co., Inc. at 6-14, *Massanari v. Sigmon Coal Co.*, No. 00-1307, *cert. granted* (U.S. Apr. 23, 2001).



conflict and compromise, and represents a balance among the sharply divergent interests of the many groups who vigorously lobbied Congress. The *Congressional Record* and contemporaneous secondary sources leave no doubt that the Coal Act engendered more than the usual degree of conflict associated with evolving federal legislation.[5]

On July 29, 1992, the day the Senate amendment which ultimately became the Coal Act was finally introduced on the Senate floor, its sponsor, Senator Rockefeller, remarked:

> This has been one of the most contentious pieces of legislation I have worked on in the Senate. I have said from the beginning

[5] *See, e.g.* 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992) (statement of Sen. Wallop) (Coal Act presented some "of the most difficult issues [Congress] encountered in seeking the passage of . . . the Energy Policy Act of 1992."); 138 Cong. Rec. S3439 (daily ed. March 12, 1992) (statement of Sen. Specter) ("[I]t has been a difficult matter for many Senators who acknowledge the need but who have some doubts as to the specific remedy."); 138 Cong. Rec. H11433 (daily ed. Oct. 5, 1992); (statement of Rep. Rodgers) ("This was an especially contentious issue that divided the coal industry."). Majority Whip Robert Byrd noted that "getting [the Act] to the floor has been anything but simple." 138 Cong. Rec. S10784 (daily ed. July 29, 1992). *See also* 138 Cong. Rec. S18250 (daily ed. Oct. 8, 1992) (statement of Sen. Glenn) ("[T]he coal industry retiree health benefits package before us today has been among the most contentious matters facing legislators this year."); Jim Rossi, *Lessons from the Procedural Politics of the Comprehensive National Energy Policy Act of 1992*, 19 Harv. Envtl. L. Rev. 195, 220 (1995) [hereinafter Rossi] (the Senate Finance Committee threatened the future of the Energy Policy Act "by approving a highly controversial coal tax proposed by Senator Rockefeller to help pay for health benefits for retired miners.").

> that my goal was to protect the health care of retired coalminers and their families, and that I was not wedded to the details of how to do it.
>
> . . . .
>
> The current approach is the one sought by the [Bush] administration and in the end it appeared to be the one most likely to command a consensus in the legislative process.

138 Cong. Rec. S10783 (daily ed. July 29, 1992). Senator Wallop, who had helped draft the Energy Policy Act, Rossi at 220, and who had been reported as "eager for a compromise" on the UMWA retiree provision that "would let the legislation move ahead,"[6] similarly commented:

> In this resolution all of us wish there were some little piece of it that we could have left as originally drafted, or not have included even as drafted.
>
> But, having said that, I think it shows the best traditions of the Senate that a resolution to a very sticky, very thorny problem was arrived at in as fair and equitable a manner.

*See* 138 Cong. Rec. S10784 (daily ed. July 29, 1992) (statement of Sen. Wallop).

In October 1992, in conjunction with the by-then pro forma passage in the Senate (84-8) of the Energy Policy Act,

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[6] Holly Idelson, *Bills to Cut Oil Dependence Finally Head to Conference*, 50 Cong. Q. Wkly. Rep. 2261 (Aug. 1, 1992).



Senator Rockefeller reiterated:

> The decision [regarding the funding mechanism] ultimately rested on the best basis for consensus in the legislative process.
>
> . . .
>
> [the] long and sometimes contentious road [was one where] [there were strong differences among many parties regarding the best solution to the problem. . . . The issue was always the difficult one of how to pay for [retiree health care].

138 Cong. Rec. at S17633 (daily ed. Oct. 8, 1992).

The balance achieved on the Coal Act in the Senate in July 1992 was so delicate that the House conferees found themselves barred from modifying any language in the UMWA Retiree Health Benefit provision of the Energy Bill. On October 5, 1992, Chairman of the House Ways and Means Committee, Dan Rostenkowski, lamented on the floor of the House:

> The House conferees are very uneasy with the provision included in the Senate Bill for financing these benefits. It appears to create numerous inequities among the companies that will be required to pay for these benefits and could set an unfortunate precedent for legislating a solution to what is, in essence, a private dispute.
>
> Yet in spite of these seemingly major and perhaps fatal flaws in their amendment, the Senate presented this to the House conferees on

> a take it or leave it basis – threatening defeat of the most comprehensive energy legislation in years if even the smallest problem were corrected by House conferees.

138 Cong. Rec. H11408 (daily ed. Oct. 5, 1992).[7]

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[7] The importance of the July 1992 compromise was reiterated in 1998, in the following Senate testimony between Senator Rockefeller and Senator Conrad:

Comments of Senator Conrad:

> [Senator Rockefeller] had to make compromises. It was not a case where Senator Rockefeller was able to sit down at the table and just write it the way he would like to do it. He had to deal with not only the Senate of the United States, he had to deal with the U.S. House of Representatives, he had to deal with an administration, and the result was a compromise. . . . I know Senator Rockefeller feels very strongly that if you start to deal with any of this, you could unwind the whole agreement, and that is what he is desperately afraid of.

*Agency Management of the !mplementation of the Coal Act: Hearings Before the Subcomm. on Oversight of Gov't Management, Restructuring and The District of Columbia of the Senate Comm. on Gov't Affairs*, 105th Cong. 11 (S. Hrg. 105-764) (1998)(testimony of Sen. Conrad).

Comments of Senator Rockefeller

> I hope the Chairman understands that, fear on my part that once you start to clarify a law that was passed, indeed, as a compromise, as Senator Conrad indicated, in the compromise that came from the Bush administration, that once one gets into the clarification of the language of law, I start to sweat.

*Id.* at 15 (testimony of Sen. Rockefeller).



3. The Coal Industry Retiree Health Care Benefit Act of 1992 (Coal Act or Act) merged the 1950 and 1974 Benefit Plans into a new entity called the UMWA Combined Benefit Fund (Combined Fund). 26 U.S.C. § 9702. Section 9706(a) directed the Commissioner[8] to assign beneficiaries in the Combined Fund to a signatory operator that had employed the beneficiary in accordance with a three-tier assignment scheme. If the signatory operator was no longer in business, then the assignment was to be made to a related person to the signatory operator, as defined at § 9701(c)(2)(A) of the Act.

The Commissioner's duties under the Coal Act were twofold; calculate the annual premium assigned operators were required to pay on behalf of each assigned beneficiary, § 9704(b); and review UMWA retiree wage histories to identify, by October 1993, the entity to whom each beneficiary was to be assigned, § 9706(a). Beneficiaries who could not be assigned to an employer were to be placed in an unassigned pool.[9]

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[8] References in original bill were to the Department of Health and Human Resources (HHS). In 1995, the Social Security Administration became an independent agency, and the Commissioner assumed the duties of the Secretary of HHS. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 108(h)(9)(A), 108 Stat. 1464, 1487 (1994).

[9]Unassigned beneficiaries' health care costs were financed initially by transfers from the overfunded UMWA 1950 Pension Plan and, effective October 1, 1995, from interest earned on the Abandoned Mine Land Reclamation Fund (AML Fund), 26 U.S.C. § 9705, a trust fund financed by an excise tax on coal operators and administered by the Secretary of Interior under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232(h). In the event the annual authorized transfer amounts

Congress also included two unusual provisions in the Coal Act. A "reach back" provision imposed premium responsibility on employers who had been signatory to a UMWA coal wage agreement as far back as 1946. 26 U.S.C. § 9706(a)(3). A "reach out" or related person provision provided that, if the signatory operator was out of business, that operator's retirees could be assigned directly to a "related person" (as defined in § 9701(c)(2)(A)), and, if an assigned operator failed to pay any premium obligation, its related persons are jointly and severally liable. 26 U.S.C. § 9704(a).

Separately, the Act imposes a statutory requirement on signatories to a 1978 or later NBCWA who were providing health benefits to UMWA retirees under an individual employer plan (IEP) to maintain that IEP for the life of the retirees and their eligible dependents. 26 U.S.C. § 9711. Section 9712 required the UMWA and the BCOA to establish and finance a companion retiree plan known as the UMWA 1992 Benefit Plan (1992 Plan). 26 U.S.C. § 9712. Definitions establishing obligations and relationships in the 1992 Plan provide insight into the meaning of definitions that govern operation of the Combined Fund.

**C. SSA's Implementation Of The Act**

1. Between 1993 and 1997, the Commissioner assigned Jericol premium responsibility for 103 retired coal miners. Pet. Appdx. at 11a; 69a-70a. Each was assigned pursuant to the third tier of Congress's three-tiered assignment priority. *See* 26 U.S.C. § 9706(a)(1)-(3). Seventeen of the assigned miners actually worked for Jericol; the other 86 had worked for Shackleford, and had retired before the sale of Shackleford's assets in 1973. Pet. Appdx. at 29.[10] The notices stated that the retirees were being allocated to Jericol due to its purported status as a "successor" or a "successor in interest" to the long-defunct Shackleford.[11]

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available from the AML Fund should prove insufficient to cover the health costs of the unassigned beneficiaries, assigned operators would make up the difference on a pro rata basis. 26 U.S.C. § 9704.

[10] Respondents do not challenge the Commissioner's authority to assign premium responsibility to Jericol for UMWA retirees Jericol actually employed. Pet. Appdx. at 71a. Contrary to the Brief of the *Amici* Trustees of the UMWA Combined Benefit Fund as *Amici Curiae* in Support of Petitioner 2, *Massanari v. Sigmon Coal Co.*, No. 00-1307, *cert. granted* (U.S. Apr. 23, 2001) [hereinafter Trustees' *Amici* Br.], Respondents have paid all premiums for Jericol's retirees.

[11] The Coal Act does not define "successor in interest" and the courts have not reached a consensus concerning the meaning to be given to the term as used in § 9701(c)(2)(A). *See In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 n.15 (4th Cir. 1996), *cert. denied*, 520 U.S. 1118 (1997). The Commissioner decided to interpret the term broadly, to include entities that purchased ongoing mining operations, although he could have chosen a more restrictive interpretation (e.g. a purchaser that takes the predecessor's tax attributes, *see In re Lady H Coal Co.*, 199 B.R. 595 (S.D. W.Va.), *aff'd sub nom.*, 99 F.3d 573 (4th Cir. 1996), *cert. denied*, 520 U.S. 1118 (1997). He also could have taken an even broader interpretation (e.g. a company that replaces a contract operator, *see Holland v. New Era Coal Co.*, 179 F.3d 397, 403) (6th Cir. 1999). Jericol's contention that it is not, in any event, a successor in interest to Shackleford within the meaning of the Coal Act has not been decided. That issue would remain if, notwithstanding the plain language of § 9701(c), the Court finds that the Act reaches a successor in interest of a signatory operator.

2. After the Commissioner rejected Jericol's administrative challenges, J.A. at 51-98, Jericol and Sigmon Coal Company, a related person to Jericol within the meaning of § 9701(c)(2)(A)(ii) of the Act, filed suit in the United States District Court for the Western District of Virginia. On November 18, 1998, the court granted summary judgment and ordered the challenged assignments withdrawn, finding that the Coal Act does not provide "for liability to be laid at the door of successors of defunct signatory operators." Pet. Appdx. at 74a. The Fourth Circuit affirmed, *see id.* at 36a, and subsequently denied the Commissioner's suggestion for rehearing on November 15, 2000.

## SUMMARY OF ARGUMENT

By 1992, the UMWA 1950 and 1974 Benefit Plans, which provided health benefits to more than 100,000 retired union coal miners and their dependents, were near collapse. Half of the beneficiaries in the Plans had never worked for the 1988 signatories who were contractually obligated to finance the Plans. The union and the operators turned to Congress for relief.

After a long and contentious debate, and several failed efforts, a compromise was reached and the Coal Act was enacted in October, 1992. Congress merged the existing health plans into the Combined Fund, and allocated the Commissioner slightly less than a year to assign responsibility for more than 100,000 beneficiaries to signatory employers in accordance with criteria set out in the Act.

The Commissioner assigned Respondent Jericol premium responsibility for 86 UMWA retirees who never worked for Jericol. The assignments are based upon the



retirees' employment by an unrelated prior employer, Shackleford Coal Company. The Commissioner asserted that Jericol was a "related person" to Shackleford within the meaning of the Act, because Jericol had purchased Shackleford's mining assets in 1973.

Jericol, and its related person, Sigmon Coal Company, challenged these assignments on several grounds, including the fact that § 9701(c) of the Act, which defines "signatory operator" and "related person," does not authorize the Commissioner to assign liability to a successor or a successor in interest of a signatory operator. The courts below agreed with Jericol, finding that the plain language of the Coal Act does not permit assignment of liability to successors in interest of a signatory operator. The ruling below should be sustained.

First, the language and meaning of § 9701(c) is clear and unambiguous. No court has accepted the Commissioner's claim that the plain language in § 9701(c)(2)(A) authorizes assignments to successors of signatory operators.

Second, other sections of the Coal Act specifically address "successor in interest" liability thereby showing that, when Congress wished to assign liability to successors in the Coal Act, it did so. Going further, the treatment of successor liability in other statutes, such as the Black Lung Act, demonstrates that Congress explicitly allocated successor liability in the coal industry when it wished to do so.

Third, isolated, conflicting, and inconclusive comments in the legislative record provide no basis for ignoring the plain language of the Act. In fact, the legislative history reflects a highly contentious debate in which compromises were made as a result of vigorous lobbying by specific interests. Those

interests included signatory and non-signatory coal companies that had acquired mining assets over the years, and that would have faced unquantified, but potentially enormous liability, if they alone were liable for a predecessor's retirees.

Fourth, the Commissioner's interpretation is not entitled to deference. He has no special expertise in this matter. He engaged in no rule-making under the Administrative Procedure Act. He shifted positions repeatedly concerning assigning liability to successors. He was not delegated authority by Congress to develop a regulatory program to implement the plain definitions and assignment provisions set out in the Act. Accordingly, even if ambiguity existed (which it does not) the Commissioner's interpretation is entitled to no deference.

Finally, contrary to the Commissioner's claim, applying the Act as written does not result in an absurd outcome that Congress could not actually have intended. The Commissioner has not shown that application of § 9701(c) as written would cause harm to any beneficiary, and it is clear from the Act's funding provisions that no one will lose benefits.

There are many reasons why Congress might have decided that liability should not be extended to successors in interest to signatory operators. Signatory and non-signatory operators might have joined in opposition to the Act had it exposed them to successor liability for transactions dating back 40 years. Applying the plain language as written simply effectuates the delicate legislative balance that permitted the preservation of the retirees' benefits through passage of the Act. Further, the sheer administrative burden on SSA to explore the extensive pre-enactment history of transactions during the very short period allowed for completing the assignment process



might have jeopardized the program. Additionally, Congress could have concluded that, in view of the fact the Act would necessarily have a dramatic financial impact on the unionized coal industry, it would be unwise to exacerbate that problem by adding an overlay of successor liability.

The plain language of § 9701(c) does not include successors of signatory operators. The language should be enforced as written.

## ARGUMENT

The scope of executive branch authority to assign Coal Act liability must be divined from the specific language that commanded a consensus in the legislature. This Court begins its statutory analysis with the presumption that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). When, as here, the meaning of a statutory provision is otherwise "unambiguous, the judicial inquiry is complete." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987)(citation omitted). Giving effect to the Coal Act's unambiguous terms is particularly appropriate here because Congress's words reflect a purposeful balancing of competing private interests borne from unusually difficult legislative deliberations and compromise. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 n.14 (1989) (citing *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 (1981)("Strict adherence to the language . . . is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises.")).

The critical statutory provision in this case is neither ambiguous nor complex.[12]

Petitioner and *Amici* Trustees' Combined Fund offer four justifications for the Commissioner's policy decision to impose liability on the successor in interest of a signatory operator: (i) read the definition of "signatory operator" at section 9701(c)(1) to encompass a successor in interest to the operator; (ii) read the definition of "related person" to a

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[12] Section 9701(c) of the Coal Act provides:

(c) Terms relating to operators. – For purposes of this section –

(1) Signatory operator. – The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

(2) Related persons. –

(A) In general. – A person shall be considered to be a related person to a signatory operator if that person is –

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).



signatory operator at § 9701(c)(2)(A) to encompass a successor in interest to the signatory operator; (iii) read the statute as being so ambiguous the Court should defer to the Commissioner's best judgment as to what Congress intended; or (iv) ignore the plain language in the statute on the basis that, as written, its application would produce a result Congress could not have intended.

As we shall demonstrate, § 9701(c) of the Coal Act, as written, is clear and easily applied, requires no deference to the Commissioner, and produces a result that is consistent with the purpose of the Act.

### A. The Unambiguous Definition Of "Signatory Operator" at § 9701(c)(1) Does Not Include a "Successor in Interest"

A "signatory operator" is "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. § 9701(c)(1). This declarative sentence is unusually easy to apply; a person either was – or was not – signatory to a "coal wage agreement," a term which itself is defined at § 9701(b)(1). The fact these terms are defined in the statute, rather than simply used in the text in a narrative fashion, strongly suggests they should be read as written. Section 9701(c)(1) simply does not include the words "successor" or "successor in interest." Any possible suggestion that the absence of these words is inconclusive is dispelled by examining the language and structure of the Act. Such review demonstrates that, when Congress intended to include a successor relationship within the scope of the Act, it did so explicitly.

Although the terms "successor" and "successor in interest" are not in § 9701(c)(1), they do appear elsewhere in

the Act. In § 9701(c)(2)(A), Congress specified that a "successor in interest" to a related person also is to be considered a related person. In § 9706(b)(2), Congress specified that a post-enactment "successor" to an assigned operator could, by mutual agreement, assume the operator's Combined Fund liability. In § 9711(g)(2), Congress specified that a post-enactment successor to a statutorily defined "last signatory operator" could, by mutual agreement, assume the operator's IEP and 1992 Plan liability. Finally, in § 9711(g)(1), Congress specified that for purposes of imposing liability on a statutorily defined "last signatory operator," that term included a "successor in interest." Since § 9711(g)(1) actually includes the very words the Commissioner asks the Court to read into § 9701(c)(1), the absence of those words from § 9701(c)(1) is clearly consequential. *Hohn v. United States*, 524 U.S. 236, 250 (1998)(citing *Bates v. United States*, 522 U.S. 23, 29 (1997)); *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

In *Eastern Enters. v. Chater*, 110 F.3d 150 (1st Cir. 1997), *rev'd sub nom. on other grounds*, 524 U.S. 498 (1998), the First Circuit was presented with the same invitation to read pre-enactment successor liability into the assignment criteria in § 9706(a). Paralleling the Commissioner's arguments in the instant case, Eastern argued that § 9706(a) was ambiguous because it was silent with respect to whether Combined Fund



beneficiaries should be assigned to a signatory operator's successor. The First Circuit rejected Eastern's claim that SSA should have filled the vacuum and assigned these miners to Eastern's successor, concluding that "reviewing the language and architecture of the Coal Act as a whole . . . we think it obvious that Congress purposely omitted any reference to successors in writing § 9706(a)'s assignment scheme." *Chater* 110 F.3d at 155 (citations omitted); *see also Brown v. Gardner*, 513 U.S. 115, 120 (1994).

In *In re Olga Coal Co.*, 159 F.3d 62 (2d Cir. 1998), the operator asked the court to import a definition from one part of the Coal Act to another. Olga's Chapter 11 Trustee argued that liability to the 1992 Plan under § 9712 is limited to operators who are still "in business," and that Olga was no longer "in business" within the statutory meaning. The court observed that "[i]n contrast to §§ 9706 and 9711, § 9712 contains no language limiting its applicability to signatory operators that remain in business." *Olga Coal*, 159 F.3d at 65. The court found this omission significant:

> This unambiguous textual distinction strongly suggests that Congress intended to exempt signatory operators no longer in business from the requirements of §§ 9706 and 9711, but not from § 9712. *See Double G. Coal Co.*, 898 F. Supp. at 355 ("[W]e must assume that if Congress had intended to exempt companies no longer in business from all of the provisions of the Coal Act, it would have so indicated.

*Olga Coal*, 159 F.3d at 66.

As the statutory construct demonstrates, Congress clearly knew how (and where) to include successors and successors in interest in the Coal Act, and it did not include them in § 9701(c)(1).

### B. The Definition of "Related Person" at § 9701(c)(2)(A) Does Not Include a Successor in Interest to a Signatory Operator

The Commissioner focuses principally on the text of the "related person" provision at § 9701(c)(2)(A) as the alleged source of his authority to assign Coal Act liability to successors in interest of signatory operators. Brief for the Petitioner at 23, 24 [hereinafter Pet. Br.]. He asserts that because the words "signatory operator" appear in clauses (i), (ii), and (iii) of § 9701(c)(2)(A), it is fair to conclude that a signatory operator is both a "signatory operator" under § 9701(c)(1) *and* a "related person" in each of the three clauses of § 9701(c)(2)(A)(i)-(iii).[13] It is, of course, self-evident that signatory operators cannot both be described in § 9701(c)(1), and also be "described" in these

[13] The Commissioner and *Amici* Trustees' Combined Fund also suggest that generic provisions of the Dictionary Act, 1 U.S.C. §§ 1-6, should be imported to further expand the Coal Act's fully reticulated definitional scheme. By its terms, the Dictionary Act does not apply where the context of the federal statute under review indicates otherwise. The Coal Act deals specifically and in several separate provisions with successors and successors in interest. Under such circumstances it would be improper to graft the Dictionary Act onto the Coal Act's definitions. *See Lindsey Coal Mining. Co. v. Chater*, 90 F.3d 688, 693 (3d Cir. 1996) (refusing to supplant or amplify "in business" definition noting the Coal Act "supplies its own definition."); *see also Rowland v. California Mens Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 (1993).



three clauses. Rather, each clause specifically describes a particular entity or type of entity which *is not* a signatory operator, but which is, by definition, a "related person" *to* a signatory operator. Thus, those clauses are descriptive of related persons, and do not purport in any way to encompass the signatory operator itself.

No judge that has considered the Commissioner's argument – including those that have agreed with him for other reasons – has found this plain language argument persuasive. Every court has rejected it as a "strained" or "tortured," or "entirely illogical" tautology.[14] As Judge Williams observed below:

> The words "signatory operator" are used in the clauses, but so are the words "limited partner." A full reading of the statute makes it clear that limited partners are in fact not to be considered related persons. There is definitely a distinction between "describing" a person and merely mentioning or naming them, and signatory operators are merely named and mentioned in

[14] *R.G. Johnson Co. v. Apfel*, 994 F. Supp. 10, 14 (D.D.C. 1998) (rejecting as "entirely illogical" SSA's attempt to shoehorn signatory operators into clauses (i), (ii), and (iii) of the "related person" definition), *rev'd on other grounds*, 172 F.3d 890, 894 (D.C. Cir. 1999) ("[W]e are unable to quarrel with the district court's conclusion that the agency's construction of the related person definition is 'tortured'."); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000) (Pet. Appdx. at 25a) ("Each clause describes persons who are connected to a signatory operator in a way that justifies 'related person' status. The inclusion of the term 'signatory operator' in each clause just explains the connection.").

the clauses. In fact, Congress demonstrated this distinction when it described signatory operators by defining them in 26 U.S.C. § 9701(c)(1).

Pet. Appdx. at 76a - 77a.

Moreover, if the term "related person" is interpreted as including a signatory operator's "successors in interest," then § 9711(g)(1) becomes mere surplusage. This is because §§ 9711(c) and 9712(d)(4) already provide that a "related person" is jointly and severally liable for the obligations of a "last signatory operator" or a "1988 last signatory operator." If "successors in interest" of signatories were already included within the statutory definition of "related persons," there would be no purpose in separately providing in § 9711(g)(1) that those obligations also extend to the "successor in interest" of a "last signatory operator." *See New Era*, 179 F.3d 403 (refusing to interpret § 9711 provisions as surplusage); *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994) ("Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting. . . .").

In sum, the Commissioner simply cannot show that the definition of "related person" provides a statutory basis for his decision to assign Jericol liability for Shackleford's retired employees. As we now show, the extra-textual sources the Commissioner relies upon provide no reason to override the Coal Act's unambiguous language.

**1. The Isolated Comments of Legislators Are Entitled To No Weight**

Where, as here, the meaning of a statutory provision is unambiguous, resorting to legislative history is inappropriate. The Commissioner points to "technical explanations" by Senators Rockefeller and Wallop as evidence of Congress's



intent to authorize assignment of liability to a successor in interest of a signatory operator. Pet. Br. at 27-28. This Court, however, has often cautioned against giving undue weight in statutory interpretation to isolated remarks of individual legislators in a comprehensive statutory scheme. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) ("Even were we to consider the sundry legislative comments urged in support of a congressional intent . . . the scant history on this precise issue does not suggest a 'clearly expressed legislative inten[t] . . . contrary . . .' to the plain language of the statute.") (citation omitted); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991)("[W]here [the statutory text] contains a phrase that is unambiguous . . . *we do not permit it to be expanded or contracted by the statements of individual legislators* or committees *during the course of the enactment process.*")(emphasis added).

Thus, Senator Rockefeller's comment "for the record" that "the term 'signatory operator' includes a 'successor in interest of such operator,'" and Senator Wallop's unelaborated statement that "in specific instances successors to the collective bargaining agreement obligations of a signatory operator" constitute a fourth category of related persons are entitled to no weight. Pet. Br. at 27-28; Trustees' Amici Br. at 21. *See, e.g., In re Burns*, 887 F.2d 1541, 1545 (11th Cir. 1989) (where the Bankruptcy Code was the result of a series of last minute conferences and compromises between managers of both houses, "the best indicators of congressional intent . . . are the language and structure of the Code itself, not the accompanying statements of legislators *that carry the potential for reclaiming that which was yielded in the actual drafting*

*compromise.*")(emphasis added). While there is some evidence that provisions consistent with these comments had been in the text of an earlier version,[15] the compromise legislation was ultimately enacted without those words. Indeed, at least three appellate courts have specifically refused to resort to floor remarks to overcome Congress's unambiguous language in the Coal Act.[16] Even the panel majority in *R.G. Johnson* deemed the legislative history "inconclusive." 172 F.3d at 894.

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[15] *See* Brief of *Amicus Curiae* R.G. Johnson Company, Inc. at 10 - 13, *Massanari* (No. 00-1307) (review of legislative history surrounding late July 1992 passage of the Senate amendment, enacted unchanged as the Coal Act). The omission of pre-enactment successor liability and inclusion of optional post-enactment successor liability in the Coal Act is significant, because the evolution of statutory provisions can be further evidence of legislative intent. *See Russello*, 464 U.S. at 23-24 ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

[16] *See National Coal Ass'n v. Chater*, 81 F.3d 1077, 1082 (11th Cir. 1996) (affirming the district court's reasoning that the legislative history of the Act does not overcome the plain statutory language); *Fawn Mining Corp. v. Hudson*, 80 F.3d 519, 521 (D.C. Cir. 1996) (affirming the district court's opinion that discounted the October 8, 1992 floor statements of Senator Rockefeller); *Olga Coal* , 159 F.3d at 67 (rejecting invitation to rely on Senator Rockefeller's October 8, 1992 remark that "[i]n Section 9712(d)(3) the payments continue to be made for as long as the signatory operator – or any related person– remains in business.").



### 2. General Successor Principles Advanced By The Commissioner Do Not Inform The Coal Act Text

The Commissioner suggests that successorship principles in other federal statutes should be reviewed to ascertain whether these principles formed a background context that may illuminate how those notions should be treated under the Coal Act. Pet. Br. at 36. In this regard, the employment law successorship liability cases offered by the Commissioner are readily distinguishable because they utilize an equitable balancing test in which a critical question is whether the successor had notice of the liability or claim against the predecessor.[17] The concepts utilized in these cases are especially ill suited as a basis for imposing liability under the Coal Act. In Jericol's case, the underlying events occurred almost 20 years before enactment of the Coal Act, at a time when UMWA retirees had no expectation of lifetime health benefits, and when Shackleford's only contractual obligation was to pay "welfare royalties" to the 1950 Fund. J.A. at 77.

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[17] *See, e.g.* EEOC v. Vucitech, 842 F.2d 936, 945 (7th Cir. 1988)("The successor, if he knows of his potential liability, will demand compensation in the form of a lower price for the assets, and in this way the burden of liability will be shifted back to the owners of those assets, where it belongs."); *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990) (notice is "critical because of our belief that it would be inequitable to hold a successor liable when it was unable to take the liability into account in negotiating the acquisition price."); *New Era*, 179 F.3d at 403 (NLRB determination of successorship is for purposes of collective bargaining, not for determining liability under the Coal Act for retiree health benefits).

Given the plain language of the Act and the absence of any persuasive legislative history to the contrary, it is highly improbable that Congress would purposely omit the term "successor in interest" from the definition of signatory operator, while intending that the Commissioner might nevertheless impose that liability on an asset purchaser. To do so would assume a congressional willingness in the Coal Act's definitional section to implicitly and retroactively override bedrock corporate law principles. *See United States v. Bestfoods*, 524 U.S. 51 (1998); 15 William Meade Fletcher et al., *Cyclopedia of the Law of Private Corporations*, § 7122, at 188 (perm. ed. rev. vol. 1983) ("Where one company sells or otherwise transfers all of its assets to another company, the latter is not liable for the debts and liabilities of the transferor.").

The Commissioner's excursion into background principles of successorship principles in other federal statutes is totally undercut by provisions in the Coal Act itself. Sections 9706(b)(2) and 9711(g)(2) specifically provide post-enactment successors with an *option* to assume a signatory operator's Coal Act obligations. These Coal Act sections demonstrate Congress chose to *exempt* a successor from such liability, even one that had full knowledge of the seller's Coal Act obligations. Since companies that acquire assets of signatory operators post-enactment do not take Coal Act liability by operation of law, there is no reason to conclude that Congress *implicitly* intended that companies which acquired assets of signatory operators *pre-enactment* take such liability by operation of law, where the plain language of the statute contains no such requirement. Thus, Congress disavowed _rather than embraced the



background successorship notions reflected in the cases relied upon by the Commissioner.

Moreover, Congress has repeatedly enacted explicit statutory provisions which accomplish what the Commissioner and *Amici* Trustees' of the Combined Fund endeavor to read into the Coal Act definitions. In 1972 and continuing through a series of amendments, Congress crafted, revisited, and significantly amended the Black Lung Act which sets out a comprehensive, cost-spreading scheme for delivering statutorily prescribed benefits to thousands of retired miners (and their dependents). *See generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding constitutionality of 1972 black lung statute). This scheme explicitly captures a wide variety of pre-enactment commercial transactions involving coal properties and assets.

From the outset (and to this day) "successors" fall explicitly within this statutory scheme, and they are required to secure the benefits of eligible miners employed by the prior operator.[18] Notably, however, "to decrease the [retroactive] burden on operators and former operators," Congress and regulators specified in the 1977 Black Lung amendments that "liability would not be imposed" based on last employment prior to 1970. *See* 43 Fed. Reg. 36803 (Aug. 18, 1978); 30 U.S.C. § 932(j)(2).

A comparison between the Black Lung Act and the Coal Act is striking as regards the treatment of successors or

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[18] 30 U.S.C. § 932(i)(3)(D) ("If an operator ceases to exist by reason of a sale of substantially all its assets . . . the successor operator . . . shall be treated as the operator. . . . ").

successors in interest. The Black Lung Act *specifically* envisions the assignment of liability to successor operators, and *explicitly* directs the Secretary of Labor to implement a regulatory program to develop the meaning of a responsible operator.[19] In the Coal Act Congress provided *no* authority to the Commissioner to develop a regulatory program expanding upon the meaning of these terms. The difference between Congress's explicit imposition of successor liability and agency regulatory authority for black lung benefits and the absence of successor liability and agency regulatory authority in the Coal Act demonstrates there was no intention under the Coal Act to capture pre-enactment successors.

### 3. There Is No Evidence That a Purpose of the Coal Act Was to Impose Liability on a Successor in Interest to a Signatory Operator

The Commissioner further argues that Congress sought to make "entities with connections to employees" responsible for those employees' health care costs. Pet. Br. at 20. To this end, he cites a statement by Senator Wallop that the number of entities made jointly and severally liable for a signatory's obligations under the definition of related persons is intentionally very broad, and that the overriding purpose of the related person provision is to find a specific obligor for as many beneficiaries in the plans as possible. *Id.* at 27, 29. Jericol, of

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[19] 30 U.S.C. § 932(h) ("The Secretary [of Labor] . . . may also, by regulation, establish standards for apportioning liability for benefits under this subsection among more than one operator, where such apportionment is appropriate.").



course, had *no* connection with Shackleford's retirees. Further, as written, § 9701(c)(2)(A) already broadly extends liability to a very large group of entities. Congress's decision to not also impose liability on the successors in interest of signatory operators does not undermine its separate assignment of liability to related persons of the signatory operator, and successors in interest to those related persons. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."); *Eastern Associated Coal Corp. v. UMWA*, 531 U.S. 57, 68 (2000) (Scalia, J., concurring) ("The final form of a statute or regulation, especially in the regulated fields . . . is often the result of compromise among various interest groups, resulting in a decision to go so far and no farther."); *see also West Virginia Univ. Hosps.*, 499 U.S. at 98 (purpose of the statute includes not only what it sets out to change but also what it resolves to leave alone).

While the Commissioner focuses on legislative comments which refer to imposing liability broadly, he glosses over remarks that demonstrate the underlying rationale of the Act was to impose liability *on the economic unit* that benefitted from the retirees' work. The technical explanation of the Coal Act inserted into the *Congressional Record* by Senator Wallop notes a preference for "a definition of responsible operator which includes every entity related to the responsible operator . . . . Broadening the definition of responsible operator in this manner is the essence of the Conference Agreement. *It recognizes the financial interdependence of these related entities* . . . ." 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992)

(emphasis added). The technical explanation further underscores the essential common ownership nexus providing "[t]his [determination] date was fixed to insure that parent corporations or other entitites related to a signatory operator could not evade responsibility for the obligations imposed under the Conference agreement *by divesting themselves of their ownership connection* . . . . " *Id.* at S17604.

Indeed, if the overarching purpose of the Coal Act simply was to assign liability to as many persons as possible, *see* Pet. Br. at 21, the Act does not accomplish that goal. For example, the Act does not provide that where an assigned operator goes out of business the operator's beneficiaries may be assigned to a prior employer. They are simply allocated to the unassigned pool and their health care costs are covered from the AML Fund. *See supra* at 13-14. The Commissioner has not assigned such beneficiaries to a prior employer although one could argue that nothing in the statute *specifically* prohibits that approach. The Commissioner's reasoning would also support a policy assigning liability to the owner(s) of a defunct signatory company. Imposition of such personal liability would impose liability upon a *person* who actually benefitted from the retiree's services. Again, the statute does not *specifically* prohibit imposing liability on individuals.

The legislative history is completely consistent with the liability expansion that flows from application of the related person definition as written. There is simply no evidence of clear congressional intent for executive branch administrators to expand the broad "related person" definition (which specifically incorporates the tax code's mechanical "controlled group" rules) to additionally capture successors of signatory operators.



"[W]hen legislation expressly provides a particular remedy . . . courts should not expand the coverage of the statute to subsume other remedies." *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 94 n.30 (1981)(quoting *National R.R. Passengers Corp.v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)).

### C. Congress Did Not Delegate The Commissioner Authority to Expand Liability Under The Act

This case involves the application of unambiguous Coal Act definitional terms. The Commissioner's inconsistent internal guidelines are not entitled to deference. *Christensen v. Harris County*, 529 U.S. 576 (2000); *United States v. Mead*, 121 S. Ct. 2164 (2001); *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

Although Congress often grants federal agencies authority to establish standards, Congress conferred no such law-making authority in connection with the Social Security Administration's ministerial, "one-time" Coal Act assignment responsibility. In contrast to the Labor Department's duties under the Black Lung Act, the Commissioner was charged with two discrete functions: calculate the annual per-beneficiary premiums assigned operators are required to pay to the Combined Fund, and review individual wage records and make assignments by October 1, 1993, in accordance with criteria set out in § 9706(a).[20]

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[20] As Acting SSA Commissioner, Lawrence Thompson acknowledged in September 1993 testimony to a congressional oversight

Further, the Commissioner never engaged in any substantive rulemaking under the Administrative Procedures Act (APA) concerning the interpretation of the Coal Act, or its definitional terms. The agency simply developed internal instructions to guide the assignment process. In fact, from passage of the Act until July 1995, these interpretations were in a constant state of flux.[21] Moreover, unlike the Department of Labor or the National Labor Relations Board, SSA has no

committee concerning SSA's specific Coal Act responsibilities, "[t]he Coal Act is very precise as to the way we assign miners to coal operators, and *SSA has no discretion as to the way we apply the criteria.*" *Provisions Relating to the Health Benefits Retired Coal Miners: Hearing Before the Comm. On Ways and Means House of Representatives* (Serial 103-59), 103d Cong. 24 (statement of Lawrence H. Thompson Acting Commissioner of Social Security) (emphasis added).

[21] In the summer of 1993 the agency initially interpreted the Coal Act as not imposing any liability on the "successors" or "successors in interest" of signatory operators. David J. Laurent et al., *Successor Liability Under the Coal Industry Retiree Health Benefit Act of 1992*, 18 E. Min. L. Inst. ch. 1, at 22 (1998) [hereinafter Laurent] (citing SSA Transmittal No. 7, dated August 1993). By January 1994, the agency had issued instructions which purported to define successor in interest narrowly using the definition in *Black's Law Dictionary*. J.A. at 63-64; Laurent at 22-23 (citing Transmittal No. 9 at RM T01402.051-2-052A.1). In December, 1994, the agency began instructing personnel to hold successor companies liable under certain circumstances. Laurent at 23-24 (citing Supplemental Coal Act Review Instructions No. 3 at 34-6). By July 1995, SSA had completed an interpretative about-face and personnel were now instructed that a signatory operator's "successor" and "successor in interest" were included in the definition of "related persons." Pet. Appdx. at 83a - 94a; Laurent at 24 (Supplemental Coal Act Review Instructions No. 4 at 3).



expertise with the coal industry or its development over the past 40 years. Under these circumstances, the Commissioner's suggestion that his determination should be upheld as "reasonable" is unavailing.

### D. Applying § 9701(c) As Written Does Not Produce A Result In Conflict With The Act

In actuality, the Commissioner's argument is not so much about the consequences of the *absence* of language authorizing imposition of liability on a successor in interest to a signatory operator, as it is about the *presence* of language which imposes that liability on a successor in interest to a related person to the signatory operator. The Commissioner suggests that permitting the assignment of liability to "a more peripherally related successor to a corporate affiliate of the signatory, in a different line of business," but not to a successor to the signatory itself, is so odd that Congress could not have intended this result. Pet. Br. at 19, 31.

The problem with the Commissioner's reasoning is that it requires the Court to legislate, not interpret. By ignoring the plain language of a statute, the Commissioner second guesses the compromises which preceded an agreement (and without which a legislative solution may not have emerged).[22] It is

[22]The Court has been especially sensitive to this consideration where the statute involves issues of "private law" as opposed to "public law," perhaps implicitly recognizing the value in adhering "as closely as possible to what the parties themselves negotiated and supposed that framework to be." Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 Emory L.J. 117, 122 (1995).

simply not the Commissioner's responsibility to improve upon Congress's solution as set out in the statute by super-imposing his selective view of the legislature's objectives. As the Court stated in *Board of Governors of the Fed. Reserve v. Dimensions Fin. Corp.*, 474 U.S. 361 (1986):

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

*Id.* at 373-74.

Instances in which a court may override plainly written legislation for reasons unrelated to its constitutionality are rare, and the standards are exacting. *Crooks v. Harrelson*, 282 U.S. 55, 61 (1930) ("[U]nless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it has done so in plain terms . . . it is not within the province of the court to modify the law by construction."). *Crooks* guides interpretation of the Coal Act because, like the federal estate tax provision at issue in *Crooks*, Coal Act premiums are housed in the tax code. In *Crooks*, the



Court noted that "to justify a departure from the letter of the law . . . the absurdity must be so gross as to shock the general moral or common sense. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Id.* at 60 (citation omitted). In *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)(quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)), the Court observed that "the plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"

Interestingly, the Commissioner does not outright ask the Court to reject § 9701(c)(2)(A) as written. Instead, he returns to this theme subtly and frequently, alluding to the supposedly anomalous result that arises from a literal application of the statute's plain language. Pet. Br. at 16, 19, 23, 31. Notwithstanding the Commissioner's concerns, there are, in fact, many reasons why Congress would have purposely exempted successors in interest of a signatory operator from the "related person" definition.

1. Coal operators doubtless would have opposed legislation that would have put them at risk for liability associated with miners they did not employ. This point was discussed at length by the court of appeals,[23] and the

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[23] *Sigmon Coal*, 226 F.3d at 307-308 (Pet. Appdx. at 33a-34a).

> As observed in the Coal Commission's report to Congress, over half of the pre-Coal Act beneficiaries were "orphans" who were drawing benefits from a pot jointly funded by coal operators. [citation omitted]. A

background facts suggest this explanation is completely consistent with the events which enabled the compromise that led to enactment.

Members of the BCOA were a driving force in the passage of the Coal Act. 138 Cong. Rec. S17636 (daily ed. Oct. 8, 1992) (statement of Sen. Warner) ("Recognizing the shortfall in funding, and faced with their inability to honor their obligations to the retired union membership, the BCOA and the UMWA have turned to the Federal Government."). BCOA member companies accepted financial responsibility for providing for *their* retirees, but sought relief from the burden of providing health care for miners they had not employed.[24]

An assignment formula placing liability upon successor companies would have raised the specter of liability for a large and potentially unquantifiable number of additional retirees linked to decades-old asset purchases. Because of their extensive history of buying and selling coal mines, successor liability covering 40 years of pre-Act transactions could have exploded the number of Combined Fund beneficiaries potentially assignable to the 1988 signatory operators.[25]

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major complaint lodged by the coal operators was that they were being required to pay benefits for retired miners who never worked for them or maintained any other relationship with them. *See* 138 Cong. Rec. S17566-01, S17607 ("The coal companies that are still fully signatory to the bargaining agreement have complained that for every dollar they have been paying into the UMWA 1950 and 1974 Health Benefit Funds for their own retirees and dependants, they pay an additional three dollars on behalf of 'orphans' of other companies."). Imposing liability under the Combined Fund upon successors in interest to signatory operators would produce the same results because operators that did not receive the benefit of the retired miners' employment would nevertheless be responsible for them under the Combined Fund. In fact, such a requirement would arguably have put coal operators who purchased another operator's assets in a worse position, since under the Act they are solely responsible for their assigned retirees. Jericol suggests that in an industry where buying and selling coal mining assets is commonplace, such a provision would present a significant impediment to the coal companies' support for the Coal Act, which, in turn, would supply Congress with a motive for omitting the provision. Indeed, the scheme for assigning retirees to coal operators was a point of contention throughout the legislative process.

[24] As the Coal Commission noted "[s]ignatory coal operators who are still in the coal business are willing to pay the fair cost of their retirees, but are increasingly unwilling to shoulder the burden of paying for orphans, which they view as an industry-wide problem." Coal Comm. Rpt. at vii (Executive Summary).

[25] Coal companies routinely buy and sell coal mines and coal property to gather a sufficient reserve base to facilitate a viable mining unit, and it is common for a coal mine to have had multiple owners. *See Amax Coal Co. v. NLRB*, 614 F.2d 872, 885-886 (3d Cir. 1980), *rev'd on other grounds*, 453 U.S. 322 (1981) (1988 signatory challenging the legality of UMWA's proposed "successorship" clause (circa 1974) designed to impose bargaining agreement on transferees, and citing Amax's "essential" practice of continually purchasing and trading coal lands and reserves); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124 (4th Cir. 1996) (detailing convoluted ownership history of particular coal mine); *U.S. Pipe*

It would have been difficult for the 1988 signatories to even estimate their potential liability under a legislative fix that included successor liability. Ninety percent of the beneficiaries to be assigned were in the 1950 Benefit Plan, which meant they had retired prior to 1976.[26] Even assuming that the UMWA Funds could provide the 1988 signatory companies data about the number of beneficiaries who had retired from each out-of-business former signatory, it would have been difficult to connect specific beneficiaries to a particular mine that a 1988 signatory might have acquired. *See* Brief of *Amicus Curiae* USX Corporation and U.S. Steel Mining, LLC in Support of Jericol at 9-10, *Massanari v. Sigmon Coal Co.*, No. 00-1307, *cert. granted* (U.S. Apr. 23, 2001) (describing SSA's assignment of several hundred retired miners to USX based on its 1970 purchase of a mine from a defunct signatory, even though few if any of the assigned miners actually worked at that mine, and even though USX sold that mine in 1982 to another

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*& Foundry Co. v. Webb*, 595 F.2d 264, 273 (5th Cir. 1979) ("Many [black lung] claimants are elderly and have not worked in coal mines for many years. A coal mine in which a claimant was employed may change operators over a period of years. Identifying a responsible operator or a potentially responsible operator is often difficult and time consuming.")(citation omitted).

[26] As of December 1989, 114,300 of the 127,052 UMWA retirees and dependents were in the 1950 Benefit Plan. Nearly half had formerly worked for signatory employers no longer in operation or no longer contributing to the Plans. Coal Comm. Rpt. at 44, 62-64. Thus, literally thousands of pre-1976 UMWA retirees were potential candidates for assignment to a 1988 NBCWA signatory under a broad based, NLRA-type successor liability concept.



company that continues to operate it today). Successor liability also could have led to litigation between operators concerning which was the most responsible party. *See e.g., Carbon Fuel Co.*, 100 F.3d at 1124 (Coal Act liability cross-claims for sale and leasing arrangements involving five coal mining companies). Against this backdrop, it is hard to imagine that the 1988 signatory companies would have agreed to a compromise that exposed them to open-ended statutory liability linked to decades of buying, selling and trading coal property.

2. Congress also may have concluded that injecting coal industry successor issues into the Commissioner's task of allocating liability for more than 100,000 UMWA retirees and dependents would consume a disproportionate share of the agency's resources, create gridlock in the assignment process, precipitate endless operator challenges under the Coal Act's administrative review process, § 9706(f), and thwart implementation of the program.[27]

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[27] The problems presented by the specter of unraveling 40 years of transactions with out-of-business signatories explains why the Combined Fund and the 1992 Plan definitional treatment of "successor in interest" differ. The ramifications of successor liability for Combined Fund obligations would have been anathema to many of the 1988 NBCWA signatory operators, but the 1992 Plan presents different considerations. That Plan provides benefits to miners who retired between July 20, 1992 and September 30, 1994, so its beneficiary population is limited and recent and the problem of unraveling decades of transactions is not a significant consideration. Additionally, Congress identified external sources for funding unassigned Combined Fund beneficiaries' health care, but required the 1988 NBCWA signatories to finance the 1992 Plan themselves, without any mitigating contribution from the AML Fund or the UMWA 1950

Congress delegated the task of making Coal Act assignments to SSA because it was the repository of employee earnings records, a critical component in making Coal Act assignments. However, SSA had no database which might provide a basis for beginning a successor analysis. *See* August 1994 internal agency correspondence, J.A. at 111 ("SSA had very limited information about the type of relationship that existed between a signatory operator and its 'related company'. All that was known, generally, was that some type of relationship existed and, most probably these would prove to be parent-child or sister company relationships . . . . Now, as additional evidence of company relationships is becoming available during the administrative review process, it appears that . . . some relationships actually involve successors . . .").

Congress allowed SSA less than a year to assign the 100,000 Combined Fund beneficiaries to former employers. 26 U.S.C. § 9706(a); *Dixie Fuel Co. v. Commissioner of Soc. Sec.*, 171 F.3d 1052 (6th Cir. 1999) (September 30, 1993 Coal Act assignment cutoff date mandatory, not discretionary). Given this short turnaround, and Congress's familiarity with administrators' problems identifying coal mine retirees' employers under the Black Lung program, Congress may have

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Pension Plan. Given these circumstances, 1988 NBCWA signatories may have supported imposing liability on successors in interest for 1992 Plan liability, if only to minimize their own liability as "guarantors" of that Plan. These differences would account for the fact that § 9711(g)(1) defines the term "last signatory operator" to include a successor in interest, whereas the definition of "signatory operator" in § 9701(c)(1) does not.



chosen to not impose a similar burden on an agency with no particular experience with the coal industry.[28]

3. Congress also could have been concerned about the adverse impact that successor liability might have had on the valuation and sale of union companies and properties. Congress was obviously sensitive to the economic impact that the Act would have on assigned operators. Sections 9706(b) and 9711(g)(2) specifically facilitate the post-enactment sale of coal property, because they provide that an assigned operator's Coal Act liability cannot be imposed on a post-enactment successor unless the successor specifically agrees to assume that obligation. This safe harbor notwithstanding, expanding §

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[28] *See* Remarks of Coal Commission Vice-Chairman Henry Perritt, favoring an industry-wide tax at a time when reaching back to former signatory employers was contemplated to stop at 1978 not *1946*, as codified:

> It is also a matter of administrative feasibility. It is extremely difficult to build a financing mechanism that relies entirely on unscrambling the supply contracts, joint ventures, capital structures, and investment roles of a decade ago to pin responsibility on investment capital that has walked away from freely undertaken funding obligations.

Coal Comm. Rpt. at 77-78 (statement of Henry Peritt); *see also* Department of Labor Comments at 43 Fed. Reg. 36,803 (Aug. 18, 1978) ("The 1977 amendments to the black lung provisions of the Act were motivated in significant part by the inability of the Secretary of Labor to assess coal operators liability in the vast part of part C claims under the then existing law. This difficulty was caused primarily by the many and intricate corporate changes which characterized business in the coal industry during the late 1950s and 1960s.").

9701(c)(2)(A) to impose liability on an asset purchaser (for miners they never employed based on transactions that occurred decades earlier) would cast a pall over *future* asset purchases in the coal industry.

If Congress had retroactively burdened coal asset purchasers for financial shortfalls arising from failures under a private party contract, future purchasers would be wary about paying fair market value for coal property (particularly property which had been subject to union representation). This is because they would have a lingering concern that a property which has a great deal of value today might be a source of devastating liability in the future. A potential post-enactment purchaser would discount its value to account for the possibility that, having imposed retroactive liability for private party contract failures on asset purchasers once, Congress might do so again. Such concerns could destabilize the unionized industry's economic underpinning, at a time when many assigned operators might need to raise money (by selling property) to help defray costs imposed by the Act.

As the foregoing considerations demonstrate, there are many reasons why Congress might have chosen to not assign liability to successors in interest of signatory operators. We turn, therefore, to the question of why the Coal Act imposes liability on successors in interest of related persons. There are several possibilities.

As noted, the NBCWA signatories were a driving force behind the Coal Act. Logically, they would support the "related person" provision as written, because it broadened the contribution base to include former signatories and their affiliates. The 1988 NBCWA operators would have had no



interest, however, in protecting a signatory operator that sold its assets (and employed the retirees) or any company related to it (the *R.G. Johnson* panel used the example of a related Coca-Cola bottling company). Nor would they have cared if liability was assigned to the person who bought the assets of the Coca-Cola bottler. The 1988 NBCWA signatories were concerned about a 40 year practice of buying mining operations from signatory coal companies, not a 40 year history of buying Coca-Cola bottling plants. The 1988 signatory operators might even have welcomed the prospect that entities outside the coal industry might be called upon to help finance the Combined Fund.

On the other hand, it is doubtful that a "related person" to a defunct signatory operator (e.g., a Coca-Cola bottling company) would have been following the debate in 1992 over the UMWA retiree health care crisis, and it is virtually impossible that a "successor in interest" to a defunct bottling company would have been aware of Congress's interest in the problem. In short, coal companies that bought assets from coal companies paid close attention and are not covered through successorship. Non-coal companies that had previously bought assets from non-coal companies most likely were not paying attention and are covered. No one would have been looking out for their interests.

In this regard, although the Commissioner's argument hangs on the fact § 9701(c)(2)(A) authorizes liability to be assigned to a successor in interest to a related person, he has not pointed to a single instance where such liability was ever imposed. In the heat of reaching a negotiated legislative solution, affected operators likely focused on ensuring that

nothing appeared in § 9701(c) which could impose liability on their pre-enactment asset purchases, but saw no need to use any "political capital" to also exclude liability for successors in interest to related persons.[29]

The legislative process often involves tough negotiations and parochial considerations. This is simply the reality of the legislative process, and demonstrates the wisdom of judicial forbearance when litigants subsequently ask the court to ignore statutory language that is plain on its face.

As regards the Commissioner's concern that literal application of § 9701(c)(2)(A) yields an anomalous result, Respondents suggest that the consequences of applying his successorship policy to make them liable for Shackleford's employees' health care are far stranger. The Commissioner attempts to impose on Jericol a substantial financial liability on behalf of individuals it never employed, solely because of a garden-variety asset purchase 20 years distant. Most remarkably, however, the Commissioner could not impose this liability on Shackleford, were it in business today, because assignments to Shackleford would have been voided *ab initio* in response to this Court's decision in *Eastern Enterprises*.

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[29]Assigning liability to an entity so distantly connected to a defunct signatory operator would, in any event, present serious Fifth Amendment issues. *See, e.g.*, 138 Cong. Rec. S17637-38 (daily ed. Oct. 8, 1992) (September 25, 1992 legal opinion discussing serious takings and due process issues raised by Coal Act derivative liability provisions). The 1988 signatories may have been content to let the courts sort the problem out if, in fact, liability was ever imposed on the purchaser of a Coca-Cola bottler's assets.



This result becomes even stranger when one considers that, because of the happenstance of the determination date for fixing related person status in § 9701(c)(2)(B), the Commissioner will (unless this Court says otherwise) impose liability on Jericol to pay for Shackleford's retirees, even though the Act bars him from assigning liability for Eastern Enterprise's retirees to its former subsidiary (because those two entities were not commonly owned on the related person determination date).

The point is not that the Commissioner should rewrite the Act so that he may assign Eastern's retirees to a former subsidiary, it is that the Act, as written, produces anomalous results in many situations. If the plain language of the Act is to be changed, the change must come from the Congress. As the Court stated in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483-84 (1992):

> Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 00-1307

# In the Supreme Court of the United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

SIGMON COAL COMPANY, INC., AND JERICOL MINING, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

Respondents maintain that, under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), a direct successor in interest of a signatory operator that employed a retired miner may not be held responsible for that miner's health-care costs. Respondents acknowledge (Br. 22) that, under the Coal Act, if a signatory operator that employed beneficiaries of the United Mine Workers of America Combined Benefit Fund (Combined Fund) is no longer in business, the Commissioner of Social Security may assign responsibility for the health-care costs of those beneficiaries to the successor in interest *of a related person* to the operator. See 26 U.S.C. 9701(c)(2)(B). They also acknowledge (Br. 22) that, if a signatory operator that employed beneficiaries of an individual employer plan (IEP) or the 1992 United Mine Workers of America Benefit Plan (1992 Plan) is no longer in business, the Commissioner may assign responsibility for those beneficiaries to the direct successor in interest of the operator *or* a successor in interest of a related person to the operator. 26 U.S.C. 9711(g)(1). Yet

they contend that Congress specifically intended the anomalous result that the direct successor in interest of a signatory operator that actually employed beneficiaries of the Combined Fund could not be made responsible for those beneficiaries.

Respondents' construction should be rejected for several reasons. First, respondents cannot avoid the anomalous results of their construction, and absent from their submission is any plausible reason why Congress would have wanted to draw such strange distinctions. Second, the text of the Coal Act does not compel respondents' construction and in fact supports the Commissioner's construction. Third, background principles of successorship law are contrary to respondents' position. Finally, to the extent the Coal Act is unclear, the Court should give deference to the Commissioner's construction of the Act.

### 1. *Anomalies in Respondents' Construction of the Coal Act*

a. Respondents' principal contention (Br. 39-43) is that the Coal Act was the product of hard-fought legislative compromise. They speculate that inclusion of successors in interest of signatory operators among those liable to the Combined Fund might have been resisted by affected interest groups. Respondents identify nothing in the legislative background to indicate that the liability of direct successors of signatory operators was controversial, or indeed that it was ever specifically opposed by anyone during the legislative process. Moreover, the only legislative history on the specific issue of direct-successor liability supports such liability. Gov't Br. 28-29. Senator Wallop, one of the Coal Act's sponsors and a leading figure in bringing the Act to final passage, explained that, because of "complex corporate structures which are often found in the coal industry," the conferees had accepted the Senate's provision for "related person" responsibility for retirees' benefits; thus, "the term



'related person' [in the Coal Act] is defined broadly to include companies related to the signatory operator," specifically including "successors to the collective bargaining agreements of a signatory operator." 138 Cong. Rec. 34,002 (1992).[1]

b. Respondents suggest (Br. 46-48) that Congress might have decided to make successors of related persons, but not direct successors, potentially liable to the Combined Fund because direct successors shared the interests of coal operators and were protected by coal companies in the legislative process. Respondents then speculate that related persons and their successors, which might have been engaged in broader range of economic pursuits (such as operating Coca-Cola bottling plants), were innocent bystanders to the legislative process and were an easy target for inclusion in the Coal Act's liability scheme. Respondents put forward nothing other than conjecture, however, to suggest that related persons as a class were not also engaged in coal mining and therefore would have had no interest in limiting liability for themselves and their successors as well.

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[1] Respondents argue (Br. 27-28) that Senator Wallop's statement is not entitled to weight because it might have been aimed at "reclaiming that which was yielded in the actual drafting compromise." Nothing in the background of the Coal Act suggests, however, that any interest group was particularly focused on the question of direct-successor liability. Moreover, the prior version of the legislation (which was vetoed by the President for unrelated reasons) expressly made direct successors potentially liable for signatory operators' beneficiaries, and the version of the Coal Act that was eventually enacted (which abandoned taxes as a mechanism to finance the health-care costs of orphan retirees) was *broader* than the predecessor in reaching entities that were connected to the original signatory operator. Gov't Br. 33-34 n.11; see 138 Cong. Rec. at 34,001 (technical explanation by Sen. Wallop) (noting that "[b]roadening the definition of responsible operator * * * is the essence of the Conference Agreement").

In any event, the Court should reject respondents' view of an Act of Congress as nothing more than a codification of private interests. This Court has always adhered to the presumption that, even where (as here) distinctions in a purely economic statute need meet only a standard of rationality, those distinctions ordinarily are expected to advance some real and legitimate object of legislative policy. See *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 345-346 (1989); see also *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992) ("plausible policy reason for the classification"). Beyond hazarding that some private interests were "in" and some were "out" in the legislative process, respondents advance no justification *in the policy of the Coal Act* for making successors of related persons of signatory operators liable but completely exempting direct successors of the signatory operators themselves.

c. Congress was aware that, under the imperiled system in existence before 1992 for financing retirees' health-care benefits, the diminishing number of operators remaining in that system were being forced to shoulder the burden of benefits for employees of signatory operators that had left the system. See Gov't Br. 32-34. Congress had before it two proposals for broadening the fiscal base for financing the health benefits of those retirees and their dependents. One proposal was the "industry-wide" solution of a tax on future bituminous coal production and importation. That proposal, although supported by some members of the Coal Commission, was criticized by others because it would have reached entities that had no connection to the system of collective bargaining associated with the National Bituminous Coal Wage Agreement (NBCWA), and it was rejected by the President. See Gov't Br. 4-5; *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate*



*Comm. on Finance*, 102d Cong., 1st Sess. 57-58, 60-61, 71-72, 77 (1991) (*1991 Senate Hearing*).

The second approach, which eventually took shape as the Coal Act, was to reach those signatory operators that had withdrawn from the NBCWA system, as well as other entities that had a sufficient nexus to those operators through some relationship—such as "related person" status and/or successorship—to be deemed responsible for the benefits of retired miners who had been employed by those operators. That second approach provided a significant benefit to operators that had remained in the pre-1992 system, because it ensured that the funding base would be significantly broadened. Although the class of successors might include some of the signatory operators that had remained in the pre-1992 NBCWA system in their own right and who purchased the mining operations of other operators, it also necessarily included a broad range of other entities that had withdrawn from, or had not previously been included in, the funding base for retirees' benefits.

Furthermore, Congress plainly perceived that it would have been insufficient to make only signatory operators and their related persons, but not any of their successors in interest, potentially responsible for retirees' benefits, for it indisputably made successors in interest of related persons potentially liable to the Fund. See 26 U.S.C. 9701(c)(2)(A) (final paragraph). Signatory operators likely recognized that the urgent need for a solution to the crisis in retired miners' health-care financing, which had already led to a long and bitter strike against the Pittston Coal Company (see Gov't Br. 3), required their acquiescence in direct-successor liability.

d. Respondents and their amici make several additional policy-based arguments against successor liability, but all of those arguments fail to explain why Congress would have made successors in interest of related persons, but not direct

successors in interest of the signatory operators themselves, responsible for retirees' benefits. For example, respondents argue (Br. 43-44) that Congress might have hesitated to impose on the Social Security Administration (SSA) the task of tracing successorship relations in the coal industry.[2] But Congress plainly required the Commissioner to make assignments to related persons and to successors in interest of related persons of signatory operators, if necessary. There is no reason to believe that the task of identifying direct successors of signatory operators is any more difficult than the task of identifying related persons of the operators and then the successors of those related persons. Moreover, as Congress anticipated, pertinent information about successorship was provided to SSA during the process of administrative review of Coal Act assignments. After SSA made initial assignments to signatory operators, those operators were entitled to request from SSA detailed information about the work history of the beneficiary and the basis of the assignment. 26 U.S.C. 9706(f)(1). That information enabled operators to demonstrate to SSA that the assignment was more properly made to other entities, including successors.[3]

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[2] Respondent relies (Br. 45 n.28) on remarks by Vice Chairman Perritt of the Coal Commission, who preferred financing through an industry-wide tax rather than an administrative mechanism of assigning individual retirees to particular operators in part because of the greater simplicity of a tax system. Congress nevertheless rejected tax financing for other reasons, and concluded that it was more appropriate to assign responsibility for individual miners' benefits to particular entities. See pp. 4-5, *supra*. The Vice Chairman's comments make clear, moreover, that Congress was aware that the latter approach would require significantly more administrative resources than a tax system, and yet it nonetheless chose such a system of assigning individual employees to particular entities.

[3] Respondents cite (Br. 44) *Dixie Fuel Co.* v. *Commissioner*, 171 F.3d 1052 (6th Cir. 1999), to argue that any initial assignment decisions made after September 30, 1993, are invalid. We disagree with that decision and are currently taking a contrary position in other circuits. See *Holland* v. *Pardee Coal Co.*, No. 00-1770 (4th Cir. argued Jan. 25, 2001); *Shenango, Inc.* v. *Massanari*, No. 00-2525 (3d Cir. to be argued Sept. 19, 2001).



Respondents also suggest (Br. 33) that Congress might have eschewed successorship liability because it intended to confine liability to the economic units (including related persons) that most directly benefitted from the retired miners' labor. That argument is plainly insufficient to support respondents' position, because Congress inarguably made successors of related persons potentially responsible for retired miners' benefits, and there is no reason to believe that those entities are more often a part of the "economic unit" that directly benefitted from the retirees' labor than are successors of the signatory operators. In any event, a direct successor of a signatory operator *does* benefit from the labor provided by that operator's former employees; the business that a direct successor purchases from a signatory operator is valuable in part because of that past labor. In addition, Congress recognized that mine operators benefit from the expectation of current employees, not only that they themselves would receive health-care benefits, but also that their retired colleagues would do so. The strike at Pittston Coal Company that led to passage of the Coal Act (see Gov't Br. 3) showed that current employees would strike over retired employees' health-care benefits. An expectation that an employer would honor promises to already-retired union members thus fostered labor peace and inured directly to the benefit of the current employer.[4]

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[4] Respondents were sensitive to that very point when they acquired Shackleford's coal mining assets. When Irdell Mining, Inc. (later Sigmon), acquired Shackleford's assets, it also assumed Shackleford's name and its obligations under the existing collective-bargaining agreement. Gov't Br. 11. As James Sigmon, the president and majority owner of Irdell, explained, Shackleford was well known and respected in the community, but Irdell was not so well known: Shackleford "knew the coal reserves, the market, *and the Union* and we didn't." C.A. App. 211 (Sigmon affidavit) (emphasis added).

Amicus Bellaire argues (Br. 19) that Congress might have considered entities that purchased substantial coal assets from signatory operators to be "too remote" from the beneficiary to include within the Coal Act's framework. Bellaire fails to explain, however, why Congress would not have perceived that successors that had purchased non-coal assets from "related persons" even more remote from the beneficiary, and yet Congress made those entities potentially liable for retirees' benefits. Amicus USX argues (Br. 7, 21-23) that successorship liability raises difficult questions of policy and administration, but all those questions are equally raised by the liability of successors in interest of related persons to the Combined Fund, which (all agree) the Coal Act expressly authorizes. In short, these arguments are not so much challenges to the Commissioner's reading of the Coal Act as they are challenges to the wisdom of Congress's decision to authorize successorship liability at all. Such arguments belong in Congress rather than in this Court.

**2. *The Text of the Coal Act***

a. We explained in our opening brief (at 23-26) that, under a straightforward reading of Section 9701(c)(2)(A), a direct successor in interest of a signatory operator may be assigned responsibility for the operator's retired employees. The last sentence of that Section provides that the term "related person" "includes" a "successor in interest" of "any person described in" its three enumerated clauses. The persons "described in" each of those enumerated clauses expressly include the signatory operator itself. Those clauses also all "describe" families of businesses that are considered related to one another by some common ownership or control, and include the signatory operator within the family. See Gov't Br. 24.

b. Respondents and their amici argue that the Commissioner's reading of 26 U.S.C. 9701(c)(2)(A) to include direct-successor liability is inconsistent with 26 U.S.C.



9706(b)(2), which permits signatory operators, at their option, to transfer their Coal Act responsibility for retirees' benefits to successors (subject to the signatory operator's remaining a guarantor of that obligation). Thus, amicus USX argues (Br. 20-21) that, by providing for optional direct-successor liability when a signatory operator's assets are sold after enactment of the Coal Act, Section 9706(b)(2) establishes a "complete scheme for preserving Coal Act liability in the context of post-enactment transactions," and so no additional, mandatory direct-successor liability is necessary or appropriate. See also Resp. Br. 30. For three reasons, that reliance on Section 9706(b)(2) is misplaced.

First, Section 9706(b)(2) addresses only transactions that occur after enactment of the Coal Act in 1992, not transactions, such as Jericol's acquisition of Shackleford in this case, which occurred in 1973. Second, it is not the case that Section 9706(b)(2) by itself ensures that, even in post-Act successorship situations, some entity will necessarily be responsible for each retiree's benefits. That argument fails to account for the situation in which, after enactment of the Coal Act, a signatory operator for legitimate business reasons sells substantially all of its assets to another entity, and then dissolves and distributes the proceeds of the sale to its shareholders, without making any provision for the successor entity to be responsible for its retirees' benefits. In such a case, if the operator's direct successor could not be made responsible for the retirees' benefits under Section 9701(c)(2)(A), and if there were no other "related person" available, then financial responsibility for the retirees' benefits would have to fall elsewhere as provided under the Coal Act—either to an entity in a lower tier under 26 U.S.C. 9706(a), if such existed, or on the public and other operators *pro rata*, under 26 U.S.C. 9704(d) and 9705(b). See Gov't Br. 6-8. That result is inconsistent with Congress's purpose of ensuring that retirees' health-care costs be borne, if possible,

by entities with the most direct responsibility for the beneficiary, and not by more remote signatory operators, or by the public fisc. See *id.* at 28.

Third, the argument based on Section 9706(b)(2) fails to apprehend that the effect of a contractual assignment of a signatory operator's liability to a direct successor under Section 9706(b)(2) is simply to provide that the direct successor will be responsible for a particular retiree's health-care costs in the first instance. If the direct successor does not pay that premium, then the original assigned operator may be required to pay it, as a guarantor. See 26 U.S.C. 9706(b)(2). And if the original assigned operator no longer exists or cannot pay, any related person may be jointly and severally liable for the operator's obligation. See 26 U.S.C. 9704(a). This mechanism of private ordering, which makes the direct successor the first entity to be responsible for premiums to the Combined Fund, stands in contrast to Section 9701(c)(2)(A). Under that provision, as administered by the Commissioner (Pet. App. 83a-94a), a successor in interest is assigned responsibility for a signatory operator's employees only if the signatory operator itself is not in business and if no "related person" meeting the criteria of the three paragraphs of Section 9701(c)(2)(A)(i)-(iii) can be found. The private ordering permitted by Section 9706(b)(2) thus supplements the Commissioner's authority to make assignments to direct successors in interest, but it does not supplant that authority.[5]

[5] This point explains why amicus R.G. Johnson errs in arguing (Br. 4-5) that the Commissioner's reading of the Coal Act at issue in this case conflicts with the Commissioner's construction that was at issue in *Eastern Enterprises* v. *Chater*, 110 F.3d 150 (1st Cir. 1997), rev'd on other grounds, 524 U.S. 498 (1998). In *Eastern*, the issue of statutory interpretation before the court of appeals was whether the Commissioner could assign responsibility for a signatory operator's retirees to the operator *rather than* assigning the retirees to a direct successor of the operator, when both remained in existence. The court of appeals agreed with the Commissioner that it was appropriate to assign responsibility to the operator rather than its successor. 110 F.3d at 154-155. While the government's brief in the district court in that case stated that "[t]he Coal Act's assignment hierarchy plainly does not require assignments to successor companies," see R.G. Johnson Amicus Br. 2a, that statement must be understood in the particular context in which it was made. Moreover, that brief explained that, under SSA's policy and reading of the Act, direct-successor assignments *can* be made, but if and only if the signatory operator and all other related persons are no longer in business. See *id.* at 5a-7a.



c. Respondents also argue (Br. 22) that the Commissioner's reading of Section 9701(c)(2)(A) cannot be reconciled with 26 U.S.C. 9711(g)(1), which states that, for purposes of Subchapter C of the Coal Act (26 U.S.C. 9711 and 9712), "[t]he term 'last signatory operator' shall include a successor in interest of such operator." Subchapter C of the Coal Act, however, governs only IEPs and the 1992 Plan, and not the Combined Fund (which is treated in Subchapter B). Its relevance for assignments of miners who are beneficiaries of the Combined Fund is therefore minimal. Accordingly, no negative inference can reliably be drawn from the fact that Congress did not include the same language in Subchapter B. Cf. *Martin* v. *Hadix*, 527 U.S. 343, 356 (1999). Moreover, an argument based on a negative inference should be rejected where, as here, it would lead to results at which "common sense would balk." *Field* v. *Mans*, 516 U.S. 59, 68 (1995).

In any event, there may have been good reason for Congress not to include language similar to that in Section 9711(g)(2) in the Coal Act's provisions governing the Combined Fund. Section 9711(g)(2) in effect *defines* a signatory operator to include a successor in interest. Congress might have decided not to include that specific language in Subchapter B because it might have suggested that, when the signatory operator was no longer in business, the operator's

direct successor should be assigned responsibility for a retiree's benefits *before* another "related person." Congress might have rejected such an approach for entities responsible to the Combined Fund based on the perception that it would be more fair to make related persons of the operator responsible before direct successors. On the other hand, for successorship transactions involving operators that are liable to the 1992 Plan, which by definition occur after the Coal Act became law, the same fairness argument would not have been persuasive, as direct successors were on notice that they would succeed to obligations to the 1992 Plan.[6]

While it is impossible to reconstruct all the various policy considerations that Congress might have considered in fashioning the Coal Act's provisions for responsibility to the

[6] Respondents also note (Br. 28 n.15) that, a few days before the Coal Act was passed, Senate Legislative Counsel circulated a draft bill that, in similar fashion, would have expressly defined a "signatory operator" to include any successor of such an operator, if the operator was no longer in business. That definition would have applied to what became Subchapter B of the Coal Act. See R.G. Johnson Amicus Br. 13a-15a. That provision did not appear in the Coal Act as eventually enacted. Such unendorsed staff materials are generally entitled to little consideration in interpreting a statute. Cf. *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.8 (1990). In any event, Congress's failure to adopt the language in the draft bill put forward by Senate Legislative Counsel sheds little light on the matter in question. By the time that draft bill was circulated, the Senate had already passed a version of legislation concerning retirees' health-care benefits, which addressed related-person and successorship liability. See 138 Cong. Rec. at 20,117-20,122, 20,161-20,167. There was no competing bill from the House of Representatives comprehensively addressing the issue of retirees' health-care benefits. The House-Senate conference accepted the Senate language without change. See Gov't Br. 28 n.9. The conferees may well have concluded that the language in the Senate-passed bill was sufficiently clear to resolve the matter, or they may have decided not to reopen the Senate language for other reasons; but in any event, this is not a situation in which Congress deliberately rejected one proposal and chose another instead.



Combined Fund, what is certain is that respondents and their amici have identified *no* policy reason for Congress to have made successors in interest of related persons liable to the Combined Fund but to have exempted direct successors in interest of signatory operators. Whether one understands this case as involving a situation where the text of the statute may and should be construed to effectuate a sensible understanding of a clear legislative policy, see *Johnson* v. *United States*, 529 U.S. 694, 706-707 n.9 (2000), or (as Judge Murnaghan suggested in dissent below, see Pet. App. 39a-44a) the rare case where the literal text of the statute does not control because it would "produce a result demonstrably at odds with the intentions of its drafters," the Commissioner's construction of Section 9701(c)(2)(A) as encompassing direct-successor liability should be upheld because it "enjoys the virtue of serving the evident congressional purpose" (*Johnson*, 529 U.S. at 708) in enacting the Coal Act.

### 3. *Background Principles of Successorship*

Respondents argue (Br. 29) that background principles of successorship liability do not support the Commissioner's construction of the Coal Act because, they maintain, those principles employ a "balancing test in which a critical question is whether the successor had notice of the liability or claim against the predecessor." Respondents fail to discuss or even cite a body of case law that Congress would have found highly relevant, this Court's decisions under the National Labor Relations Act (NLRA), including *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987), which endorsed a broad approach to successorship under the NLRA. In that case, the Court determined that an employer that succeeds to a predecessor by purchasing its assets (not just through merger or consolidation, see *id.* at 31-32, 43-44 & n.10) is obligated to bargain in good faith with the union that represented the predecessor's employees. The Court emphasized that the policy of labor law protecting

the employees' right to choose a bargaining representative should not be "subject to the vagaries of an enterprise's transformation." *Id.* at 40.

So too in the Coal Act, Congress has unmistakably followed a policy of protecting retired miners from the vagaries of corporate transformation. As the Vice Chairman of the Commission explained at the Senate hearing on the Coal Act, the shifting of corporate forms was a critical factor in the inability of the pre-1992 system for retirees' health benefits to marshal a sufficient funding base:

> [B]ased on everything that the Commission learned about the practices in the industry, this is an industry in which it is common to have a variety of business association forms with respect to operations to a particular physical mine, and for those forms of business association to change over time. This is so whether it be joint ventures, whether it be subsidiaries that are here today and gone tomorrow, whether it be subsidiaries that are thinly capitalized and turn out to be undercapitalized and so they are gone.

*1991 Senate Hearing* 15; see Gov't Br. 4-5. Congress acted to protect retirees' health-care benefits from the danger that the entity that had employed the miners and was most directly responsible for financing those benefits would be "here today and gone tomorrow." Indeed, in the Coal Act, Congress went even further than the National Labor Relations Board and this Court had gone in *Fall River*, for it permitted the Commissioner to assign responsibility for an operator's employees not only to its direct successors in interest, but also to its related persons (and their successors), using a deliberately broad definition of "related person." See Gov't Br. 33-34 n.11 (explaining how Congress broadened definition of "related person" from prior version of legislation, to reach entities with only 50% common stock



ownership). Congress thus demonstrated its intent that the Commissioner should not treat the corporate veil as an iron curtain. It would be inconsistent with that statutory policy to graft onto the Coal Act a conception of successor liability even narrower than that adopted in similar labor and benefits statutes (see Resp. Br. 31-32).[7]

Respondents argue (Br. 29) that Congress did not intend to look to background principles of successorship because successorship liability often turns on whether the successor had actual notice of the predecessor's obligation. Plainly, however, Congress did not consider such notice of be essential to successorship liability under the Coal Act, because Congress explicitly made successors of related persons of signatory operators potentially liable for the operator's retirees, even if that relationship arose before enactment of the Coal Act. See 26 U.S.C. 9701(c)(2)(B) (providing that relationships are to be determined as of July 20, 1992).

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[7] Respondents argue (Br. 31-32) that, had Congress intended to make successors of signatory operators responsible to the Combined Fund for the health-care benefits of the operators' retired employees, it could have followed the approach of the Black Lung Benefits Act, Pub. L. No. 91-173, 83 Stat. 792, as amended, which expressly makes certain successors of operators liable for miners' black-lung benefits. See 30 U.S.C. 932(i). The black-lung benefits program is of little relevance here, for two reasons. First, under that program, Congress imposed liability on successors *only* when the successorship relationship was created on or after the effective date of the original act. See *ibid.* The Coal Act, by contrast, indisputably applies in the case of at least some successorship relationships created before the Act was passed—namely, those involving successors of interest of related persons. Second, Congress has, since 1978, exempted even original operators from liability for black-lung benefits for miners who left employment before the original act was passed in 1969. See 30 U.S.C. 932(c). Rather, most such benefits are paid out of the Black Lung Disability Trust Fund, which is financed in part by a tax on coal production. See 30 U.S.C. 932(j)(2); 26 U.S.C. 9501; 26 U.S.C. 4121. The Coal Act, however, is based on a congressional determination *not* to rely on public funds for the financing of miners' benefits. See Gov't Br. 5.

Successors to related persons obviously could not have had notice of the obligations that would later be imposed under the Coal Act, and they might also have been unaware of the original operators' obligations under collective-bargaining agreements. A direct successor, by contrast, would ordinarily have had notice of the original operator's collective-bargaining obligations, and respondents voluntarily assumed those obligations. See J.A. 23, 26.[8]

[8] Respondents and their amici also argue that the Commissioner's criteria for the identification of successors (Pet. App. 86a-87a) go beyond the statute, even insofar as it authorizes liability for a successor in interest of a related person. See Resp. Br. 15 n.11; USX Br. 10-11. As respondents properly acknowledge, see Br. 15 n.11, that question is not before the Court. That issue is not included within the question presented by the certiorari petition. The court of appeals expressly declined to address that issue, and assumed for purposes of its decision that respondent Jericol is a successor in interest, within the meaning of the Coal Act, to Shackleford. See Pet. App. 23a-24a n.5.

Respondents also rely (Supp. Br. 1-4) on the D.C. Circuit's recent decision in *Holland* v. *Williams Mountain Coal Co.*, 256 F.3d 819 (2001), which rejected the argument by the Trustees of the 1992 Plan that a coal company that had purchased the coal mining assets of another company was a "successor in interest" of the original operator under 26 U.S.C. 9711(g)(1). That Section defines a signatory operator to include a successor in interest of that operator, for purposes of the 1992 Plan. See pp. 11-12, *supra*. The Commissioner has no administrative role in implementing of the 1992 Plan, and thus has had no occasion to construe Section 9711(g)(1), and also did not participate in the *Williams Mountain* case. To the extent the D.C. Circuit might have concluded in that decision that the term "successor in interest," wherever it appears in the Coal Act, necessarily means only an entity that succeeds to the tax attributes of the predecessor entity (see 256 F.3d at 823, 825), we disagree. We note, however, that it is questionable whether the companies involved in *Williams Mountain* would have been successors in interest even under the Commissioner's interpretation of that term as used in Section 9701(c)(2)(A), because those companies never employed any of the miners employed by the predecessor firm. See 256 F.3d at 820. Under the Commissioner's construction, a company may be a successor in interest of a signatory operator only if, among other things, it "uses many of the same employees who worked for the former owner," Pet. App. 86a, a condition that parallels successorship principles under the NLRA. See *Fall River*, 482 U.S. at 41.



**4. *Deference to the Commissioner***

Respondents argue (Br. 35-37) that the Commissioner's interpretation of the Coal Act to include direct-successor liability is not entitled to deference. Respondents argue that the Commissioner's administration of the Coal Act is purely ministerial and does not require him to make any legal determinations. That contention is incorrect.

First, even respondents acknowledge that not all the relevant terms of the Coal Act that fix entities' responsibility to the Combined Fund are self-defining. For example, the Coal Act plainly contemplates that the Commissioner may assign responsibility for a retiree to a successor in interest of a related person of a signatory operator. See 26 U.S.C. 9701(c)(2)(A). As respondents point out (Br. 15 n.11), however, courts have adopted a number of approaches to the liability of successors in interest. Congress did not define that term in the Coal Act. Because Congress knew that the Commissioner would have to give content to that concept in making assignments under the Coal Act, it necessarily "left a gap for the agency to fill." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); see also *United States* v. *Mead Corp*, 121 S. Ct. 2164, 2171-2172 (2001) (even absent express delegation of law-making authority to the agency, "the agency's generally conferred authority" may make clear that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law"). Similarly, while the Coal Act does expressly "include" certain entities within the reach of "related person," see 26 U.S.C. 9701(c)(2)(A), it does not expressly *define*

that term to *exclude* direct successors in interest, and thus it leaves to the Commissioner the authority to make a reasonable determination that direct successors in interest are within the category of related persons. See Gov't Br. 41-42.[9]

Second, unlike the Customs Service letter-ruling system that the Court examined in *Mead*, the Commissioner's process for assignment of retirees to operators under the Coal Act is, by statute, "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement" with the force of law. *Mead*, 121 S. Ct. at 2172. After the Commissioner assigns a beneficiary to an operator, that assigned operator has the right to further administrative review of the assignment decision and to obtain from SSA "detailed information as to the work history of the beneficiary and the basis of the assignment" in order to challenge the assignment. 26 U.S.C. 9706(f)(1). If the Commissioner "determines," based on the administrative review, that "an assignment was in error," he "shall notify the assigned operator" and the Combined Fund of the error, and he "shall review the beneficiary's record for reassignment." 26 U.S.C. 9706(f)(3)(A)(i) and (ii). Thus, while the Coal Act does not require "on the record" adjudica-

[9] Respondents rely (Br. 35-36 n.20) on a 1993 statement by then-Acting Commissioner Lawrence H. Thompson, to the effect that SSA had "no discretion" as to the way it applied the criteria for operator liability under the Coal Act. In context, however, it is clear that he was referring to the Coal Act's three-tier system for assignment of liability to operators, and in particular the dates and durations of a miner's employment. See *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 21-22 (1993). In addition, Acting Commissioner Thompson explained that, under the Coal Act, responsibility for a signatory operator's employees could pass to the operator's successor. See *id.* at 24-25. Mr. Thompson's statement is therefore entirely consistent with our submission here.



tion for assignments, cf. 5 U.S.C. 554(a), it does provide a centralized administrative mechanism for SSA formally to consider evidence and legal arguments in support of claims of error in assignments. See J.A. 51-66 (respondents' administrative-appeal letter in this case).

Even if full *Chevron* deference is not applicable here, the courts should give at least "some deference" to the Commissioner's application of the Coal Act, given the "specialized experience and broader investigations and information available to the agency." See *Mead*, 121 S. Ct. at 2175 (internal quotation marks omitted). The Commissioner's final program instructions for implementation of the Coal Act reflect lessons learned from review of the histories of hundreds of signatory operators that employed thousands of miners. See *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong., 1st Sess. 23-24, 27 (1995) (statement of Principal Deputy Commissioner Lawrence H. Thompson).[10] Those lessons include confirmation of what Senator Wallop and Members of the Coal Commission observed—namely, that the coal industry was marked by constantly shifting corporate forms, and that if the concept of "related person" were not construed broadly, then financial responsibility for many retired miners would be foisted on the public, or on other signatory operators that had had

[10] Respondent objects (Br. 36 n.21) that SSA had previously followed a more restrictive approach to the concept of successorship liability. As this Court has made clear, to the extent that an agency has discretion in interpreting a statute, it also has discretion to change its interpretation, as long as the construction that it eventually adopts is reasonable and the change in position is not undertaken in an arbitrary and capricious manner. "[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 742 (1996). In addition, respondents have made no claim that they legitimately relied on the agency's prior, narrower approach to successorship. *Ibid.*

no connection with those miners. The Commissioner properly recognized that the recurrence of the "orphan miner" problem that plagued the pre-1992 NBCWA system would be contrary to Congress's purpose, expressed in the Coal Act itself, to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry] retirees." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142, 106 Stat. 3037. Accordingly, the Commissioner's determination that a direct successor in interest of a signatory operator that employed beneficiaries of the Combined Fund may be assigned responsibility for those beneficiaries when the signatory operator itself is defunct and no other related person may be found is reasonable and should be upheld.

* * * * *

For the foregoing reasons as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Solicitor General*

SEPTEMBER 2001

Aug 28, 2001 (13)

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No. 00-1307

# In the Supreme Court of the United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY,
Petitioner,
v.
SIGMON COAL COMPANY, INC. AND JERICOL MINING, INC.,
Respondents.

REC'D TEAM 11
AUG 31 2001
UNSCANNED

On a Writ of Certiorari to The United States Court of Appeals For The Fourth Circuit

## RESPONDENTS' SUPPLEMENTAL BRIEF

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## RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents bring to the Court's attention the July 31, 2001 decision of the United States Court of Appeals for the District of Columbia Circuit in *Holland v. Williams Mountain Coal Co.*, No. 00-7072 (D.C. Cir. July 31, 2001) attached hereto as a Supplemental Appendix [hereinafter SA]. In *Williams Mountain*, Toney's Branch Coal Co., the statutorily defined "last signatory operator" of six retirees eligible to receive health benefits from the UMWA 1992 Benefit Plan (1992 Plan), went bankrupt. The trustees of the 1992 Plan assigned monetary premium liability for their ongoing health benefits to Augusta Processing, Inc. and Williams Mountain Coal Co., successive bona fida asset purchasers who never employed them. As the basis for imposing this statutory liability, the 1992 Plan trustees relied on § 9711(g)(1) of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. §§ 9701-9722. SA 2-3. Section 9711(g)(1) provides that the term "last signatory operator" includes a "successor in interest of such operator." The 1992 Plan trustees adopted the multi-factor "substantial continuity of operations" test to give the undefined term "successor in interest" a meaning broad enough to sweep in these two acquiring companies. SA 4.

However, the court of appeals concluded that a "natural reading" of the text of § 9711(g) and the structure of the Coal Act "point powerfully" toward the asset purchasers' position that "successor in interest" should be interpreted in accordance with narrower corporate or tax law concepts. SA 4-7, 14-16. Such definitions require succeeding to the wealth of the predecessor, typically through a corporate reorganization. SA 5, 16.

In a number of respects, *Williams Mountain* is relevant to the Court's consideration of whether the Commissioner of Social Security (Commissioner) can lawfully burden Respondents under the Coal Act with UMWA Combined Benefit Fund (Combined Fund) premium liabilities for an arms-length seller's UMWA retirees.

1. Respondents have argued that if, as the Commissioner contends, the definition of "related person" at § 9701(c)(2) of the Coal Act mandates that the Commissioner impose Combined Fund liability on a "successor in interest" to a statutorily defined "signatory operator," then § 9711(g)(1) would be mere surplusage. Brief of Respondents at 26 [hereinafter Resp. Br.]. Similarly, in *Williams Mountain*, the court of appeals rejected the 1992 Plan trustees' proposed reading of "successor in interest" in § 9711(g)(1), in part, because their expansive reading would effectively render the term "successor" in § 9711(g)(2) surplusage. SA 6.

2. The Commissioner has argued that § 9701(c) of the Coal Act should be construed to encompass successors in order to effectuate "Congress's stated purpose of ensuring that each Combined Fund beneficiary's health-care costs is borne (if possible) by the person with the most direct responsibility for the beneficiary, and not by other signatory operators that had no connection with the beneficiary, or the public fisc." Brief of Petitioners at 28 [hereinafter Pet. Br.]. In *Williams Mountain*, the 1992 Plan trustees similarly brushed aside the text of the Coal Act and urged that the sweeping substantial continuity of operations test be adopted for "successor in interest" to fulfill Congress's intent to assign liability "to persons most responsible



for plan liabilities." SA 8. The court of appeals rejected this argument, noting:

> What the trustees fail to explain is why companies such as the two here – whose only link to the six miners is to have started mining operations with equipment bought from Toney's Branch, after the six retired, at the mine where the six had formerly worked – are in any material respect more 'responsible' for plan liabilities for the six than is the broad class of firms funding the 1992 Plan.

*Id.* At the same time, the court of appeals recognized there was no chance of these retired miners being denied their statutorily mandated benefits. Rather the "only issue" was whether such expenses would borne by the bona fida asset purchasers or the entire class of coal operators that formerly promised to fund the benefits of orphan UMWA retirees. SA 4, 8.

3. The Commissioner has argued that the judicial treatment of successor liability in cases arising under various federal labor, employment, and benefits statutes before the passage of the Coal Act compels the conclusion that, in passing the Coal Act, Congress intended to impose retrospective Combined Fund liability on Respondents. Pet. Br. at 36-39. In *Williams Mountain*, the 1992 Plan trustees advanced a similar argument. SA 9. However, following a thorough analysis of the Coal Act and the caselaw relied upon by the 1992 Plan trustees (caselaw also relied upon by the Commissioner) the court of appeals concluded that, for numerous reasons, "there is no warrant whatever for broad successor liability [under § 9711(g)(1) of the Coal Act]." SA 14.

Notably, in his concurring decision Judge Sentelle echoes Respondents' point, Resp. Br. 31-32, that the congressional treatment of successor liability in the Black Lung Benefits Act provides the appropriate model for addressing successor liability under the Coal Act. As Judge Sentelle observed:

> If Congress had sought to adopt something similar to the trustees' articulation of the substantial continuity of operations test it likely would have done so explicitly. For example, the Black Lung Benefits Act holds companies liable for benefit payments to coal-mining employees when the companies are successive operators of a coal mine or acquire substantially all of the assets of the previous operator. *See* 30 U.S.C. § 932(i)(1). Of course, in the Coal Act, Congress did not adopt this approach.

SA 17.

Indeed, Judge Sentelle rejected the proposition that the courts should import doctrines such as the substantial continuity test to determine successor liability for statutes other than the National Labor Relations Act. SA 21-22. ("It is the role of Congress, not the judiciary, to establish when successors should be held liable for the statutory violations of predecessor companies and whether successors have obligations to their predecessor's former employees. . . . When Congress seeks to establish broad rules of successor liability, it will do so on its own. *See, e.g.*, 30 U.S.C. § 932(i)(1). Under the Coal Act, it did not.") (citations omitted).



Respectfully submitted.

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# United States Court of Appeals

## FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued April 6, 2001 Decided July 31, 2001

No. 00-7072

MICHAEL H. HOLLAND, ET AL.,

APPELLANTS

v.

WILLIAMS MOUNTAIN COAL COMPANY,
*D/B/A* NAOMA COAL COMPANY,
AND AUGUSTA PROCESSING, INC.,

APPELLEES

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Appeal from the United States District Court
for the District of Columbia
(No. 96cv01405)

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*Peter Buscemi* argued the cause for appellants. With him on the briefs were *Stanley F. Lechner*, *David W. Allen* and *John R. Mooney*. *Charles P. Groppe* entered an appearance.

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Gregory B. Robertson* argued the cause for appellees. With him on the brief were *Susan F. Wiltsie, Mary Lou Smith* and *Charles L. Woody.*

Before: WILLIAMS, SENTELLE and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Concurring opinion filed by *Circuit Judge* SENTELLE.

WILLIAMS, *Circuit Judge:* Under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act" or "Act"), 26 U.S.C. §§ 9701-9722 (1994), the duty of paying premiums for the health benefits of certain retired miners falls on the "last signatory operator." *Id.* § 9711(a). For the six miners whose benefits are involved here, it is undisputed that Toney's Branch Coal Company was that operator. But Toney's Branch is bankrupt. The Act also imposes the duty on any "successor in interest" of the last signatory operator. *Id.* § 9711(g)(1). Defendant firms Augusta Processing and Williams Mountain never employed any of the six miners, but right after the withdrawal of Toney's Branch they successively operated Shumate Eagle mine (where Toney's Branch had employed the six miners), using other miners who had worked at Shumate Eagle for Toney's Branch, and equipment previously used by Toney's Branch at the mine. The sole issue before us is whether Augusta and Williams Mountain can on that account be held liable as "successors in interest" of Toney's Branch.

* * *

From 1991 until September 1994 Toney's Branch, a "contract mining" firm, mined coal from Shumate Eagle under contract with the mine's owner. In September 1994 the mine



owner terminated the contract with Toney's Branch and sold the mine. The new owner contracted with Augusta to operate the mine, which it did until October 1995. Augusta used equipment that it had purchased, in an arm's length transaction, from an affiliate of Toney's Branch. In October 1995 Williams Mountain bought the mining equipment from Augusta and took up the mining operation. Neither Augusta nor Williams Mountain ever held an ownership interest in Toney's Branch, or vice versa. Meanwhile, Toney's Branch continued mining operations elsewhere, until its demise in bankruptcy.

Plaintiffs are trustees of the 1992 United Mine Workers of America ("UMWA") Benefit Plan ("1992 Plan"). The Plan was established under the Act, as part of Congress's response to the failure of certain coal companies to pay the health benefits they promised their miners. Under successive National Bituminous Coal Wage Agreements ("NBCWAs") between the coal operators and the UMWA, companies had agreed to pay benefits not only for their workers but also for workers whose employers had failed to meet their obligations under the agreement, so-called orphaned workers. *R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 892 (D.C. Cir. 1999). A considerable number of operators responded by withdrawing from the Agreement, either to continue mining with nonunion employees or to leave the coal business altogether. See *Eastern Enters. v. Apfel*, 524 U.S. 498, 511 (1998). The result was a spiral of increasing obligations for the remaining signatories, and increasing withdrawal. *Id.* In response, Congress sought to assign health care liability in a form that would be free from such unraveling. *Id.* at 513-14.

The plaintiff trustees are obligated to provide benefits for retirees who are entitled to benefits under § 9711 (including the six involved here) but who are not receiving them. 26 U.S.C. § 9712(b)(2)(B). If they cannot compel payment by the last signatory operator, a related person, or a "successor in interest," they can adjust the premiums they charge employers obliged to contribute to the 1992 Plan. *Id.* § 9712(d)(2)(B). Thus there is no chance of the miners being denied their benefits. The only issue is whether the expenses will be borne by defendants or by the broad class of coal operators obliged to fund the 1992 Plan. The trustees contend that defendants Augusta and Williams Mountain are "successors in interest" within the meaning of § 9711(g)(1) and therefore responsible for the charges. The district court disagreed and granted summary judgment for defendants. We affirm.

* * *

The trustees urge a broad definition of successors in interest, namely the "substantial continuity of operations test." This is a multi-factor inquiry that examines, among other things, the ability of the predecessor to provide relief; whether the new employer had notice of potential liability; whether he uses the same plant, equipment and workforce; and whether he produces the same product. See, e.g., *Secretary of Labor v. Mullins*, 888 F.2d 1448, 1453-54 (D.C. Cir. 1989). Under this standard, the companies may well be successors in interest to Toney's Branch: Toney's Branch is now bankrupt, the Act is familiar to all coal operators, and the companies seamlessly took over operations at Shumate Eagle.

Against this the companies urge narrower definitions, drawn both from general corporate law and from federal tax law



(noting that the Act is in fact embedded in Title 26, the Internal Revenue Code ("I.R.C.")). *Black's Law Dictionary* (6th ed. 1990), for example, provides the standard corporate law definition:

> In order to be a "successor in interest", a party must continue to retain the same rights as original owner without change in ownership and there must be change in form only and not in substance, and transferee is not a "successor in interest." . . . In case of corporations, the term ordinarily indicates statutory succession as, for instance, when corporation changes its name but retains same property.

*Id.* at 1283-84 (citations omitted). In the alternative, the companies suggest a definition from the I.R.C. that shares with the corporate law definition the element of commingled ownership. See 26 CFR § 1.1503-2A(c)(3)(vii)(B); 26 U.S.C. § 381. Under both of these definitions the "successor in interest" is a successor to the *wealth* of the predecessor, typically through a corporate reorganization. A party simply acquiring property of a firm in an arm's length transaction, and taking up its business activity, does not become the selling firm's "successor in interest." Under both definitions the companies are plainly not successors in interest of Toney's Branch, and we need not here wrestle with which of them is to be preferred in the event of a clash.

Because both sides assume that federal law controls the meaning of "successor in interest," we do the same. See generally *Atchison Topeka & Santa Fe Ry. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362-64 (9th Cir. 1998).

At the outset the trustees' proposed reading of § 9711(g)(1) encounters difficulty from the adjacent statutory language. While § 9711(g)(1) mandates that "successors in interest" share liability with last signatory operators, § 9711(g)(2) permits "successors" to assume by contract liability for health benefits owed to retirees. The natural reading is that Congress intended "successors" in subsection (g)(2) to include a broad class of persons, e.g., firms that take over mining operations from others, and are *not* liable as a matter of law, but assume liability by contract with the seller to suit the mutual convenience and risk-allocation preferences of the contracting firms. If § 9711(g)(1) imposed liability by law on virtually all potential candidates for the (g)(2) transaction, the latter would, for the most part, be surplusage. See *Holland v. New Era Coal Co.*, 179 F.3d 397, 403 (6th Cir. 1999).

The trustees respond that, because the section heading for § 9711(g)(1) is "Successor," Congress intended the terms "successor" and "successor in interest" to be used interchangeably. For them the only role of § 9711(g)(2), as against subsection (g)(1), is to allow successors to contract for *primary* responsibility. But, quite apart from the customary reluctance to give great weight to statutory headings, see, e.g., *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947), it seems very odd to use a heading, which normally is a kind of shorthand, to justify stripping the actual text of two words, "in interest," that were obviously included deliberately.

This conclusion accords with the structure of the Act. Section 9711 specifies two groups that share liability with last signatory operators: related parties and successors in interest.



Related persons, defined in § 9701(c)(2)(A), encompass members of a controlled group of corporations including the signatory operator in question, a business under common control with the signatory operator, and a person in a partnership or joint venture with the signatory operator in the coal business. A common feature of all such entities is that they share ownership or comparable economic interests with the signatory operator. Understanding successor in interest as embodying the standard corporate concept gives it a closely congruent meaning.

We note that the Internal Revenue Service has promulgated definitions of "successor in interest" for various specific purposes. See, e.g., 26 CFR § 1.1503-2A(c)(3)(vii)(B); *id.* § 301.6110-2(*l*); *id.* § 302.1-1(e). See also *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 n.14 (4th Cir. 1996). Because of the variety of definitions we question whether the term can be said to have received the sort of consistent treatment that led the Supreme Court in *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993), to infer, for the phrase "sale or exchange," an intent to incorporate a previously "settled" meaning. *Id.* at 159. But we also note that the trustees do not claim that *any* of the definitions chosen by the IRS in other contexts is broad enough to sweep in the two coal companies here.

In sum, then, the text and structure of § 9711 point powerfully toward the two companies' position. The trustees, however, brush aside this textual analysis and offer three arguments to support a broad definition of successors in interest. First, they contend that the Act is a remedial statute and therefore should be liberally construed. This is meaningless.

All statutes seek to remedy some problem, so the maxim does nothing to identify what statutes should be "liberally construed" (assuming that phrase to have a discrete meaning). *E. Bay Mun. Util. Dist. v. U.S. Dep't of Commerce*, 142 F.3d 479, 484 (D.C. Cir. 1998); *Ober United Travel Agency, Inc. v. U.S. Dep't of Labor*, 135 F.3d 822, 825 (D.C. Cir. 1998).

Second, trustees argue that broad successor liability fits Congress's stated intent to assign the duty of paying premiums "to persons most responsible for plan liabilities." 26 U.S.C. § 9701 note (Findings and Declaration of Policy) (quoting § 19142 of Pub. L. No. 102-486). For our purposes Congress here selected the last signatory operator, Toney's Branch, the last firm to receive benefits from the six miners' labor. After that the Act assigns liability to related persons, § 9711(b), and to successors in interest, § 9711(g)(1). What the trustees fail to explain is why companies such as the two here—whose only link to the six miners is to have started mining operations with equipment bought from Toney's Branch, after the six retired, at the mine where the six had formerly worked—are in any material respect more "responsible" for plan liabilities for the six than is the broad class of firms funding the 1992 Plan. The defendants' arm's length purchase of mining equipment at the Shumate Eagle mine seems to tie them to the six miners no more than would any firm's purchase of any assets (office equipment, real property, etc.) from Toney's Branch. The set of operators that would bear the premiums for the six miners' benefits under the 1992 Plan, however, are all signatories to the 1988 NBCWA, whereby they have promised to fund the benefits of orphan retirees. THE SECRETARY OF LABOR'S ADVISORY COMMISSION ON UNITED MINE WORKERS OF



AMERICA RETIREE HEALTH BENEFITS, COAL COMMISSION REPORT 27 (Nov. 1990). The Coal Act merely enforces these promises. 26 U.S.C. § 9712(d).

Even if Congress's purpose were recast in more general terms—securing health benefits for retired miners, see, e.g., 26 U.S.C. § 9701 note (Findings and Declaration of Policy)—broad successor liability is hardly essential to that goal. The six miners will receive benefits regardless of whether the defendants are billed for them. To address the concern that in the absence of successor liability the scheme set up by the Act might collapse as last signatory operators sold off assets, pocketed the money, and declared bankruptcy, the Act itself expressly denies effect to any transaction of which a "principal purpose . . . is to evade or avoid liability." 26 U.S.C. § 9722. The bankruptcy laws similarly provide relief against fraudulent transfers. See, e.g., 11 U.S.C. § 548. Nor is it the case that lack of successor liability would discourage some conduct Congress sought to encourage; this contrasts (for instance) with the Multiemployer Pension Plan Amendments Act ("MPPAA") of 1980, where courts have been concerned that without broad successor liability firms would be discouraged from joining pre-existing multi-employer pension agreements. See *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1329 (7th Cir. 1990). Here the classes of both beneficiaries and ultimate obligors is substantially fixed. Not only does the Act apply solely to miners who retired by September 30, 1994, 26 U.S.C. § 9712(b)(2), but it legally obligates their employers, if they have signed a 1988 NBCWA, to provide benefits, *id.* §§ 9712(d), 9701(c)(3).

The trustees' final argument is that courts have often used the substantial continuity test to determine successor liability in federal statutes (particularly those adopted for the protection of employees), even when those statutes include no language directly supporting liability for successors of any kind. Because statutory interpretation proceeds on the assumption that Congress's choice of words reflects a familiarity with judicial treatment of comparable language, *Traynor v. Turnage*, 485 U.S. 535, 545-46 (1988), we cannot say, without some consideration of the cases using substantial continuity, that the trustees' claim is *a priori* wrong. In reality, however, courts have adopted that standard only in the presence of certain factors, the most notable of which, at least, is palpably missing here.

Before presenting our core objections to the trustees' argument, we review, for context, the origins of the substantial continuity test. Under the traditional rule on corporate successorship liability, a corporation that acquires manufacturing assets from another corporation does not thereby assume the liabilities of the seller. The rule admits four exceptions: (1) when the successor expressly or impliedly assumed those liabilities; (2) when the transaction may be construed a de facto merger; (3) when the successor may be considered a "mere continuation" of the predecessor; and (4) when the transaction was fraudulent. See *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174 (5th Cir. 1985) (citing 15 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, § 7122 (Perm. ed. 1983)). Most relevant for our purposes is the "mere continuation" exception. Traditionally, this applies when, after the transfer of assets,



there is an identity of stock, stockholders, and directors between the purchasing and selling corporations. See, e.g., *Weaver v. Nash Int'l, Inc.*, 730 F.2d 547, 548 (8th Cir. 1984). Thus the "mere continuation" exception appears to closely parallel the basic "successor in interest" concept invoked by Augusta and Williams Mountain.

As the Third Circuit has observed, the traditional rule concerning the liability that attaches to asset sales was "designed for the corporate contractual world," and "protects creditors and dissenting shareholders, and facilitates determination of tax responsibilities, while promoting free alienability of business assets." *Polius v. Clark Equipment Co.*, 802 F.2d 75, 78 (3rd Cir. 1986). But it is also generally applied in cases involving tort plaintiffs, see, e.g., *id.* at 82-83; *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977), and the beneficiaries of federal statutes, see, e.g., *Atchison Topeka & Santa Fe Ry.*, 159 F.3d at 364 (Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")), even though such parties may have had no real opportunity to protect their interests by contract with the predecessor corporation. For their protection some courts have stretched the "mere continuation" test into the substantial continuity of operations test advocated by the trustees, see *Polius*, 802 F.2d at 78 (noting cases); *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1152-54 (1st Cir. 1974). The majority, however, still follow the traditional rule in tort cases, see *Polius*, 802 F.2d at 80 (products liability); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 cmts. a, b (1997), and in cases involving federal statutes such as CERCLA, see *Atchison, Topeka & Santa Fe Ry.*, 159 F.3d at 364.

In the context of federal statutes whose primary beneficiaries are employees, however, it appears that most courts invoke the substantial continuity test. This departure from the traditional rule was sparked by four Supreme Court cases, two involving disputes under the National Labor Relations Act ("NLRA"), *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972), and two the Labor Management Relations Act ("LMRA"), *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Rest. Employees & Bartenders Int'l Union*, 417 U.S. 249 (1974); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). Neither statute mentions successors, let alone successors in interest. *Steinbach v. Hubbard*, 51 F.3d 843, 845 (5th Cir. 1995). Yet, proceeding under principles of equity, the Court in each case addressed the extent to which successors to the originally liable firm's operations could be lawfully burdened with promises entered or statutory torts committed by their predecessors. The Court weighed congressional interest in the policy promoted by the statute, and the extent to which successor liability would promote it, against the cost and inequity to the successor of imposing liability. See, e.g., *Golden State*, 414 U.S. at 184; *Burns Int'l*, 406 U.S. at 287-88.

Although the four cases concerned the core labor relations statutes, the reasoning has been used to find broad successor liability under other statutes that govern employees' rights whether they explicitly address successor liability, *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240, 244-45 (8th Cir. 1991) (Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA")); *Vanderhoof v. Life Extension Inst.*, 988 F.



Supp. 507, 512-13 (D.N.J. 1997) (Family Medical Leave Act) (relying on NLRA and Title VII case law), or not, *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1235-36 (7th Cir. 1986) (Title VII); *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 745- 46 (7th Cir. 1985) (Civil Rights Act of 1866). In none of these cases, however, did the text and structure of the underlying legislation point firmly against successor liability based on substantial continuity of operations. The four Supreme Court cases that provide authority for these cases, for example, interpreted a pair of statutes that, unlike the statute before us, failed to give guidance on successor liability one way or the other. Moreover, even pursuing this line of cases would leave our conclusion unchanged.

A key factor motivating courts to extend successor liability beyond the textual bounds of a statute is that the victim of the predecessor's behavior may be left without a remedy unless recourse against the successor is allowed. *Musikiwamba*, 760 F.2d at 746. (This is, of course, ordinarily an aspect of Congress's intent.) The relief sought under the statutes involved in the *Howard Johnson-Golden State* line of cases is *typically* "nonmonetary and can be effective only if directed against the workers' current employer." *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 748 (7th Cir. 1994) (Age Discrimination in Employment Act ("ADEA")); see, e.g., *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 936-37 (D.C. Cir. 1998) (successor's duty under NLRA to bargain with union for predecessor's employees); *Leib*, 925 F.2d at 247 (successor's duty under VEVRAA to rehire predecessor's employee); *Criswell v. Delta Air Lines, Inc.*, 868 F.2d 1093, 1094 (9th Cir. 1989) (successor's duty under ADEA to rehire predecessor's

worker and change mandatory retirement policy); *Bates v. Pac. Marine Mkt. Ass'n*, 744 F.2d 705, 710-11 (9th Cir. 1984) (successor's duty to obey Title VII consent decree requiring a certain level of representation of blacks among workforce at a harbor). Even if the remedy sought by the plaintiff in a particular case is simply damages, the possibility that other plaintiffs suing under the same statute may seek injunctive relief supports successor liability under that statute. *G-K-G*, 39 F.3d at 748. But the Coal Act contemplates no specific performance remedies. 26 U.S.C. § 9711(a); see also *id.* §§ 9704(a), 9712(d). Because (1) only pure money cases may be brought, (2) the "successor in interest" standard of corporate law allows the beneficiary (or the 1992 Plan trustees) to pursue the *wealth* of the last signatory operator, and (3) the Coal Act as a whole assures protection for the beneficiary without his incurring the costs and risks of pursuing a departed past employer, there is no warrant whatever for broad successor liability.

Thus we reject the trustees' claim that § 9711(g)(1) adopts the "substantial continuity of operations" test. As we observed before, the two companies prevail here under either of their candidates—the general corporate definition or one of the special tax definitions, see, e.g., 26 CFR § 1.1503-2A(c)(3)(vii)(B); 26 U.S.C. § 381. Accordingly we may leave to another day the resolution of any differences in detail between these and possibly other candidates.

The judgment of the district court is

*Affirmed.*



SENTELLE, *Circuit Judge, concurring:* I concur completely in the result reached by the majority and its basic textual analysis of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-22. This analysis alone is sufficient to support the outcome reached by the majority; the remainder of the opinion is obiter dicta. I write separately because I fear the majority's discussion of the trustees' final argument—that we should adopt a broad substantial continuity test—may be misleading. The cases from our sister circuits that have "extend[ed] successor liability beyond the textual bounds of a statute" are in no way relevant to our analysis in this case. Opinion at 10. While it is fashionable in some legal circles to deride "hyper-technical reliance upon statutory provisions," *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1227 (Fla.), *vacated*, 531 U.S. 70 (2000), this Court does not—and should not—move in them.

The majority cites the Supreme Court's decision in *Traynor v. Turnage*, 485 U.S. 535, 545-46 (1988), for the proposition that we must assume that "Congress's choice of words reflects a familiarity with judicial treatment of comparable language." Opinion at 8 [SA 10]. In fact, the *Traynor* Court assumed that by using a specific term in a veterans' benefits statute, Congress "intended that the term receive the same meaning for purposes of that statute as it had received for purposes of other veterans' benefits statutes." 485 U.S. at 546. In other words, the Court stated that statutory terms should be interpreted in the same way in statutes covering similar topics—not in any statute

covering any topic. *Cf. Del Commercial Props., Inc. v. Commissioner*, 251 F.3d 210, 218 (D.C. Cir. 2001).

In the present case, this maxim of statutory interpretation suggests that the term "successor in interest" in the Coal Act should be interpreted consistently throughout the Internal Revenue Code, *see Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993), and that Congress was aware of how the term had been interpreted in that context, *see Traynor*, 485 U.S. at 546. Treasury Regulations define "successor in interest" as "an acquiring corporation that succeeds to the tax attributes of an acquired corporation" through the following transactions: the liquidation of a subsidiary, a merger or consolidation, the sale of "substantially all of the properties of another corporation" for voting stock, 26 U.S.C. § 381, or the mere change of identity. 26 C.F.R. § 1.1503-2A(c)(3)(vii)(B). Relatedly, state business association law historically has been used to determine the tax liability of "a successor corporation for the debts of its predecessors." 15 MERTENS LAW OF FEDERAL INCOME TAXATION § 61.17, at 47 (2000); *see also United States v. First Dakota Nat'l Bank*, 137 F.3d 1077, 1079-80 (8th Cir. 1998); *Atlas Tool Co. v. Commissioner*, 614 F.2d 860, 870 (3d Cir. 1980); *George v. Commissioner*, 2000 WL 1545066 (T.C. Oct. 19, 2000) (mem.). In West Virginia, where both the defendant companies are incorporated, a corporation that purchases the assets of another corporation is not liable for the debts of the seller unless: (1) the purchaser expressly or impliedly assumes the liability, (2) the transaction was fraudulent, (3) "some element of the transaction was not made in good faith," (4) the purchase effected a consolidation or merger, or (5) "the successor corporation is a mere continuation



or reincarnation of its predecessor." *Jordan v. Ravenswood Aluminum Corp.*, 455 S.E.2d 561, 563 (W. Va. 1995); *see also West Texas Ref. & Dev. Co. v. Commissioner*, 68 F.2d 77, 80 (10th Cir. 1933) (applying the same factors in a tax dispute). Under either of these formulations, the defendant companies would not be liable under the Coal Act. This analysis is sufficient to affirm the district court's decision in this case.

If Congress had sought to adopt something similar to the trustees' articulation of the substantial continuity of operations test it likely would have done so explicitly. For example, the Black Lung Benefits Act holds companies liable for benefit payments to coal-mining employees when the companies are successive operators of a coal mine or acquire substantially all of the assets of the previous operator. *See* 30 U.S.C. § 932(i)(1). Of course, in the Coal Act, Congress did not adopt this approach.

The majority's lengthy discussion of cases employing the substantial continuity of interest test does not clarify "judicial treatment of comparable language." Opinion at 8 [SA 10]. As the majority recognizes, courts largely have adopted this test in cases when the statute at issue does not address successorship, much less use the term "successor in interest." *See, e.g., Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1986).

The majority rightly traces this analysis to four Supreme Court decisions. Two of these decisions dealt with claims brought under the Labor Management Relations Act (LMRA), and two arose from decisions issued by the National Labor Relations Board (NLRB) pursuant to the National Labor Relations Act (NLRA). In the first of the LMRA decisions, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 544

(1964), the Supreme Court addressed whether a successor company was required to comply with an arbitration clause in a collective bargaining agreement between a union and the predecessor company. Significantly, the predecessor corporation had merged with the successor corporation, and the Court was confronted with a question of "contractual origin"—and therefore did not interpret or apply any statute. *See id.* at 545, 546, 550-51. Construing the contract and noting the "substantial continuity of identity in the business enterprise" following the merger, the Court held that the successor corporation was required to comply with the arbitration clause. *Id.* at 551. Later, the Court explained that the *Wiley* "holding dealt with a merger occurring against a backdrop of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 286 (1972).

In the second LMRA case, *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 251-52 (1974), a franchiser bought all of the personal property associated with a franchisee's business operation, but did not retain the franchisee's employees. The employees' union claimed that the franchiser was required to "arbitrate the extent of its obligations" to the employees under the collective bargaining agreement between the franchisee and union. *Id.* at 253. The Court held that the franchiser was not bound by the agreement because it did not have a "substantial continuity of identity" with the franchisee. *Id.* at 264. The *Howard Johnson* Court contrasted the circumstances of the case with *Wiley*, emphasizing that *Wiley* "involved a merger, as a result of which



the initial employing entity disappeared." *Id.* at 257. In *Howard Johnson*, however, "the initial employers remain in existence as viable corporate entities." *Id.* Significantly, in neither *Wiley* nor *Howard Johnson* did the Supreme Court purport to interpret the LMRA—or any statute—to encompass any successorship doctrine.

Unlike *Wiley* and *Howard Johnson*, the Court in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 171-72 (1973), and *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. at 277, reviewed the Board's interpretation of its organic statute. When reviewing such decisions, the Court employs a deferential standard, upholding the Board's interpretation of the NLRA as long as it "adopts a rule that is rational and consistent with the Act." *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *see Golden State Bottling Co.*, 414 U.S. at 181 (considering "whether the Board properly exercised its discretion" in ordering a bona fide purchaser of a business to reinstate employees with backpay when the predecessor corporation had engaged in unfair labor practices); *Burns Int'l Sec. Servs.*, 406 U.S. at 278-79 (holding that "it was not unreasonable" for the NLRB to hold that the successor employer is required to bargain with an existing certified union). Indeed, "[i]n *Burns* [the Supreme Court] approved the approach taken by the Board and accepted by the courts with respect to determining whether a new company was indeed the successor to the old." *Fall River*, 482 U.S. at 43. That approach, as the majority explains, is the broad totality of the circumstances test that the trustees now advocate. *See id.*

In previous cases, this Court has affirmed the use of the substantial continuity of interest standard to determine the

obligations of successor corporations—but only when reviewing an agency decision that had employed it. For example, in *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 938 (D.C. Cir. 1998), we upheld the NLRB's conclusion that a company that merely leased assets from a predecessor company could still be a successor required to bargain with an existing union if it met the broad substantial continuity test. *See also Pa. Transformer Tech., Inc. v. NLRB*, No. 00-1388, slip op. at 4-5 (D.C. Cir. June 29, 2001). Our decision was based on the deference we accord to NLRB rules that are "rational and consistent" with the NLRA. *Harter Tomato*, 133 F.3d at 937 (internal quotation omitted). Similarly, we deferred to the Federal Mine Safety and Health Review Commission when it used the test to determine successor liability under the Mine Safety and Health Act. *See Secretary of Labor v. Mullins*, 888 F.2d 1448, 1451 n.10, 1453-54 & n.15 (D.C. Cir. 1989). Our deference to reasonable statutory interpretations made by agencies to which Congress has specifically delegated authority should not be confused with an adoption of those interpretations or a belief that they are correct. We have never interpreted a statute *de novo* and concluded that liability under the statute is determined based on a substantial continuity of interest.

In contrast, some courts have adopted the substantial continuity standard when interpreting statutes *de novo*. In doing so, they have relied on the four Supreme Court decisions discussed above—even though the cases before them did not review an agency decision, did not focus on labor contracts, and



did not even deal with statutes that mention successorship. This reliance is mistaken.

The Supreme Court has never adopted any amorphous totality-of-the-circumstances test in cases raising successorship questions not arising in a context requiring deference to an agency. Instead, it has stated that there must be a "substantial continuity of identity in the business enterprise," which "necessarily includes . . . a substantial continuity in the identity of the work force across the change in ownership." *Howard Johnson Co.*, 417 U.S. at 263 (citation omitted). Even if this language could be read with the breadth some of our sister circuits suggest, the Supreme Court has only applied it in cases dealing with current employees seeking to establish a company's obligations under an existing collective bargaining agreement, and then only has found such a continuity when two companies have merged, one of those companies has been extinguished, and all of the predecessor's employees have been retained by the successor company. Furthermore, nothing in either *Howard Johnson* or *Wiley* can be read to extend the reach of their holdings beyond their "contractual origin," much less beyond statutes governing labor-management relations.

The courts that have morphed the substantial continuity standard of *Howard Johnson* and *Wiley* into a sweeping totality-of-the-circumstances standard have allowed rules adopted by the NLRB pursuant to its authority under the National Labor Relations Act, *see, e.g., Fall River*, 482 U.S. at 43, to serve as the law for other statutes well outside the NLRB's reach. *See, e.g., Musikiwamba v. ESSI Inc.*, 760 F.2d 740, 750 (7th Cir. 1985). It is the role of Congress, not the judiciary, to establish when successors should be held liable for

the statutory violations of predecessor companies and whether successors have obligations to their predecessor's former employees. *See Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1237 (7th Cir. 1986). Courts simply should not extend liability "to a variety of statutory contexts when the equities have so dictated" no matter how "important" the policy they seek to fulfill. *Upholsterers' Int'l Union Pension Fund v. Arctic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990). When Congress seeks to establish broad rules of successor liability, it will do so on its own. *See, e.g.*, 30 U.S.C. § 932(i)(l). Under the Coal Act, it did not. Insofar as the majority's opinion by discussion of the "factor[s] motivating courts to extend successor liability beyond the textual bounds" of statutes suggests any legitimacy for that approach, I wish to make plain that that is not the holding of this case, nor the analysis that commands my concurrence.

No. 00-1307

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# In the Supreme Court of the United States

LARRY G. MASSANARI,
ACTING COMMISSIONER OF SOCIAL SECURITY,
*Petitioner*,

v.

SIGMON COAL COMPANY, INC., and
JERICOL MINING, INC.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether, under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, the Commissioner of Social Security may assign beneficiaries of the UMWA Combined Benefit Fund to an employer that is the successor in interest to a defunct coal operator that formerly employed the retired miners in question.

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## INTEREST OF THE *AMICI CURIAE*

The UMWA Combined Benefit Fund ("Combined Fund") is a statutory health care trust created by Congress under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* ("Coal Act").[1] The Coal Act was passed to remedy a crisis in the funding of the preexisting collectively bargained multiemployer retiree health benefit plans in the coal industry, a crisis that threatened to deprive retired miners and their dependents of promised health benefits. Under Section 9702 of the Coal Act, the preexisting UMWA benefit plans were merged into the newly created Combined Fund, and the Combined Fund began providing retiree health coverage as of February 1, 1993. The Trustees of the Combined Fund, chosen in accordance with Section 9702 of the statute, are charged with the responsibility for administering the Combined Fund, collecting health care premiums from assigned operators, and providing health coverage to the Combined Fund's beneficiaries.[2]

The issue in this case is whether the Coal Act permits the Social Security Administration ("SSA") to assign Combined Fund beneficiaries to the "successor in interest" of an out-of-business "signatory operator," as those terms are used in the Coal Act. Pet. I. That issue is of substantial and immediate concern to the Combined Fund. Since February 1993, the

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[1]This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the Combined Fund, its Trustees, or its counsel, has made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court.

[2]The Trustees of the Combined Fund are William P. Hobgood, Michael H. Holland, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. Van Horn, and Gail R. Wilensky.

Combined Fund has provided benefits for all of the beneficiaries assigned to respondent Jericol Mining, Inc. ("Jericol"), despite the fact that Jericol and its related person, respondent Sigmon Coal Company ("Sigmon"), have failed in significant part to pay for those benefits.[3] The decision of the panel majority in the court below has prevented the Combined Fund from collecting the balance of the premiums owed by respondents, and, if permitted to stand, could substantially alter the provision of health care in the manner Congress intended under the Coal Act.

The Combined Fund seeks to ensure that the base of contributing employers remains as broad as possible, so as to prevent an ever-increasing burden from falling upon an ever-declining group of employers, which, in turn, could lead to a repeat of the crisis that Congress sought to resolve when it enacted the Coal Act in the first place. If the decision below stands, there is a serious possibility that companies liable under the Coal Act would seek to use the device of a successor firm to evade their statutory obligations. Assigned operators could terminate their Coal Act liability simply by changing the ownership of their working assets, distributing their proceeds to shareholders, and continuing their operations in a new corporate form. If this were to occur, the health benefits for the affected beneficiaries would be financed by an ever-shrinking group of responsible companies with no relationship to the beneficiaries. This would go a long way toward re-creating the very sort of dwindling funding base that Congress sought to rectify through the Coal Act.

The Trustees accordingly have a strong interest in supporting the position of petitioner in this case.

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[3]SSA assigned certain Combined Fund beneficiaries to Jericol as a direct successor in interest to a defunct signatory operator, Shackleford Coal Company ("Shackleford"). Pet. App. 11a.



## STATEMENT OF THE CASE

This case concerns retiree health care in the coal industry. The question presented arises from the congressional response to a financial crisis that threatened to render the collectively bargained multiemployer health care plans insolvent and disrupt the provision of lifetime health care benefits that more than 100,000 retired and disabled coal miners and their families legitimately had come to expect. This Court previously addressed the turbulent history of health care for retired coal miners and their dependents, including the financial crisis encountered by the industry's contractual retiree health care system, in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 504-15 (1998)(plurality opinion).[4] A brief summary of the relevant historical events and the essential elements of the Coal Act places in proper context the question of statutory interpretation presented here.

### A. Health Care in the Coal Industry Prior to the Coal Act

The first coal industry multiemployer benefit plan was created in 1946 by the historic Krug-Lewis Agreement, an

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[4]An in-depth discussion of the financial crisis leading to the Coal Act is also contained in the Coal Commission Report: A Report to the Secretary of Labor and the American People (Nov. 1990). This report was reprinted, and its findings were discussed, in *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102d Cong. (1991). A copy of the Coal Commission Report was attached to the Combined Fund's *amicus curiae* brief in the court of appeals, and a copy has been lodged with the Clerk of this Court.

agreement between the United Mine Workers of America ("UMWA") and the United States that settled a national strike during which the federal government seized virtually all the nation's coal mines. *Eastern*, 524 U.S. at 505. Shortly after the Krug-Lewis Agreement, the mines returned to private control, and the UMWA and coal operators entered into the 1947 National Bituminous Coal Wage Agreement ("1947 NBCWA"). The 1947 NBCWA established the UMWA Welfare and Retirement Fund (the "1947 W&R Fund"), which was financed by a royalty on coal production. *Id.* at 505-06.

A continuing disagreement over benefits led to execution of the 1950 NBCWA. It created the UMWA Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"). *Eastern*, 524 U.S. at 506. The 1950 W&R Fund, like its predecessor, operated on a pay-as-you-go basis, providing benefits from a fixed amount of royalties. It continued to provide health care benefits to UMWA miners and their dependents until 1974.

Under the 1974 NBCWA, partly in response to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), and its specific funding and vesting requirements for pension plans, the UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA")[5] agreed to divide the 1950 W&R Fund into four separate multiemployer plans. *Eastern*, 524 U.S. at 509. Two of the four new plans provided pension benefits to retired miners. The other two plans, the 1950 Benefit Plan and the 1974 Benefit Plan, provided health benefits to retired miners. The 1950 Benefit Plan provided health benefits to eligible UMWA miners who left covered service in the coal industry before 1976. The 1974 Benefit Plan

[5]The BCOA is a multiemployer bargaining association that represents various large and small bituminous coal operators in collective bargaining with the UMWA.



provided health benefits for miners who left covered service in 1976 or later. The 1974 Benefit Plan also provided health benefits to the active work force.

Although retiree health benefits had been provided by the UMWA Funds since the 1940's, the 1974 NBCWA was the first agreement between the UMWA and BCOA that referred expressly to health benefits for retired miners. *Eastern*, 524 U.S. at 509. The agreement referred explicitly to lifetime health benefits for retirees, disabled miners, and spouses. Despite this change, however, the manner in which employers were required to contribute to the multiemployer plans remained unaltered. A fixed amount of royalties continued to be the only required contribution from participating employers. *Id.*

In 1978, the UMWA and BCOA restructured the industry's contractual health care system in response to financial problems caused by a variety of factors, including a decline in the amount of coal produced, the retirement of a generation of miners, and the rapid escalation of health care costs. *Eastern*, 524 U.S. at 510-11. The signatory employers to the 1978 NBCWA agreed to establish individual employer health plans to provide benefits to their own active employees and retirees who left covered service in 1976 or thereafter. The primary responsibility for providing health care for such retirees and the active work force thus shifted from the 1974 Benefit Plan to the individual coal operators that were signatory to the 1978 NBCWA and successor agreements. The 1950 Benefit Plan continued to provide health benefits to persons who left covered employment before 1976, and the 1974 Benefit Plan was retained as an "orphan" plan to provide retiree health benefits to UMWA retirees who left covered service in 1976 or thereafter and whose last employer had gone out of business. *Id.* The 1978 NBCWA, like the 1974 NBCWA, also referred explicitly to lifetime retiree health benefits. Indeed, every NBCWA since

1974 has contained such express references to lifetime health coverage.

### B. The Crisis in the UMWA Plans and the Coal Commission Report

Despite the changes made to the multiemployer plans in 1978, serious funding problems persisted. *Eastern*, 524 U.S. at 511. During the years immediately preceding enactment of the Coal Act, these problems severely threatened the financial stability of the 1950 and 1974 Benefit Plans. Several factors led to this crisis. The number of signatory operators declined while the cost of providing medical care dramatically increased, thus placing a greater and greater financial burden upon fewer and fewer employers. *Id. See also Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 654 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999) ("By 1990, contributions from a shrinking number of coal producers proved insufficient to fund the four benefit plans, and those plans were awash in red ink."). As a result, "[b]y the late 1980s, the UMWA Plans were facing insolvency," and, as in the past, "the issue of continued, stable funding for retiree benefits contributed to protracted labor unrest." *Holland v. Keenan Trucking, Inc.*, 102 F.3d 736, 738 (4th Cir. 1996).

One of the most serious labor disputes was a ten-month strike by the UMWA against the Pittston Coal Company and related entities. The prolonged Pittston dispute was resolved only after Secretary of Labor Dole intervened and facilitated a settlement. As part of this settlement, Secretary Dole established an advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"), an industry-wide commission authorized to analyze the retiree health care crisis and to recommend solutions. *Eastern*, 524 U.S. 511-12.



The Coal Commission issued its findings and recommendations on November 5, 1990. Observing that retiree health benefits should be continued and that the collective bargaining process was inadequate to provide a long-term solution, the Commission recommended:

> the imposition of a statutory obligation to contribute on current and past signatories, mechanisms to prevent future dumping of retiree health obligations, authority to utilize excess pension assets and the implementation of state-of-the-art managed care and cost containment techniques.

Coal Comm. Rpt. at 60.

### C. The Coal Act: Congress' Solution to the Health Care Crisis in the Coal Industry

Following the Coal Commission's report, Congress conducted its own intensive examination of the health care crisis in the coal industry. After two years of deliberation, Congress enacted the Coal Act.

The statute created two new trust funds for the provision of health care benefits to retired miners and their dependents. The first of these funds, the Combined Fund, is involved here.[6] Under Section 9702 of the Coal Act, the 1950 and 1974

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[6]The Coal Act also required the continuation of the existing collectively bargained individual employer plans, and it created the UMWA 1992 Benefit Plan for specified beneficiaries not eligible to receive coverage from the Combined Fund. 26 U.S.C. §§ 9711, 9712.

UMWA Benefit Plans were merged into the Combined Fund as of February 1, 1993. *See* 26 U.S.C. § 9702. The Combined Fund now provides health benefits to coal industry retirees and their dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Plan. 26 U.S.C. § 9703(a), (b)(1), (e), (f).

The Coal Act reflects Congress' finding that:

> it is necessary to modify the private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037 (codified in 26 U.S.C. § 9701 (historical note) (1994)). *See also Eastern*, 524 U.S. at 514.

Congress intended that "the largest possible number of beneficiaries in the Plans be assigned to a specific or designated company." *See* 138 Cong. Rec. S17605 (daily ed. Oct. 8, 1992) (reproducing proposed conference committee report). It also intended that an assigned beneficiary should remain "the responsibility of a particular operator, and that the number of unassigned beneficiaries should be kept to an absolute minimum." *Id.*

**D. The Structure of the Coal Act**

To accomplish its stated purpose, Congress adopted a financing arrangement for the Combined Fund under which employers that were signatory to one or more NBCWAs are required to share the burden of financing Combined Fund health



benefits for the affected retirees and their dependents. Each employer's annual liability to the Combined Fund is based on the number of Combined Fund beneficiaries assigned to it by SSA under Section 9706 of the Act.

The Coal Act thus reflects the congressional decision that "those companies which employed the retirees in question, and thereby benefitted from their services, will be assigned responsibility for providing the health care benefits promised in their various collective bargaining agreements." *See* 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992) (reproducing proposed conference committee report). *See also Eastern*, 524 U.S. at 514.

The Coal Act also addressed the financing of health care coverage for true "orphan" retirees — Combined Fund beneficiaries whose former employers (and their related companies) are no longer in business and who therefore could not be assigned under Section 9706 of the statute. Congress provided that the cost of providing health benefits to such retirees and their dependents should be paid through a combination of funds transferred from the UMWA 1950 Pension Plan, public money, and contributions from signatory employers that voluntarily participated in the UMWA multiemployer health benefit system and received assignments of beneficiaries from SSA. *See* 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992).

In particular, Congress provided for three $70 million transfers from the UMWA 1950 Pension Plan to be used primarily to pay for unassigned beneficiaries' health care during the Combined Fund's first three plan years. 26 U.S.C. § 9705(a). Congress further provided that in each subsequent year a substantial transfer would be made to the Combined Fund from the Abandoned Mine Land Reclamation Fund ("AML Fund") established under the Surface Mining Control and Reclamation Act of 1977. 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h). These annual transfers (which are capped at the

amount of interest earned by the AML Fund or $70 million, whichever is greater) may be used only to finance health care for unassigned beneficiaries.

Finally, if the Combined Fund's unassigned beneficiary expenses cannot be entirely defrayed by the transferred amounts, the Coal Act provides for an unassigned beneficiaries premium to be assessed against all assigned operators, in proportion to each such operator's pro rata share of the total number of assigned Combined Fund beneficiaries. 26 U.S.C. § 9704(d). Congress thus concluded that, if necessary, unassigned beneficiaries' health coverage should be financed by those employers that voluntarily participated in the collective decision to provide health care through pooled multiemployer plans and thus contributed to the origins of the health care crisis in the coal industry.

In addition, the Coal Act embodies Congress' decision to close the "loopholes" that previously had allowed employers to avoid their obligations under the NBCWAs. To implement this decision, Congress provided that not only "signatory operators" but also their "related persons" would be liable to pay Combined Fund premiums. Accordingly, Section 9701(c)(2)(A) provides:

> **(2) Related persons.** (A) In general. A person shall be considered to be a related person to a signatory operator if that person is —
>
> (i) a member of the controlled group of corporations (within the meaning of section 52(a)[of the Internal Revenue Code]) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under section 52(b)[of the Internal Revenue Code]) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).



Under Section 9704(a) of the Coal Act, "[a]ny related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator." 26 U.S.C. § 9704(a).

### E. Implementing the Coal Act: The Role of SSA

In the Coal Act, Congress directed the Secretary of Health and Human Services to assign eligible Combined Fund beneficiaries to specific employers, which then would have the responsibility to make premium payments under the statute. The Secretary delegated this task to the Commissioner of Social Security.[7]

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[7]Subsequently, Congress enacted the Social Security Independence and Program Improvements Act of 1994, which, among other things, amended the Coal Act to substitute the "Commissioner" for the "Secretary" throughout the statute. Pub. L. No. 103-296, §§ 105(a)(2)(A), 108(h)(9), 108 Stat. 1487-88 (1994).

SSA assigns eligible beneficiaries to signatory operators pursuant to a three-tiered set of statutory priorities. SSA is directed first to assign an eligible beneficiary to a signatory operator that was a signatory to a 1978 or later coal wage agreement and "was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years." 26 U.S.C. § 9706(a)(1).

If an assignment cannot be made under this criterion, SSA is directed to look to an operator that was a signatory to a 1978 or later coal wage agreement and "was the most recent signatory operator to employ the coal industry retiree in the coal industry." 26 U.S.C. § 9706(a)(2). If an assignment still cannot be made, SSA is directed to assign the eligible beneficiary in question to the signatory operator that "employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement." 26 U.S.C. § 9706(a)(3).[8]

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[8]In their brief in opposition (at 4 n.3), respondents attempt to align themselves factually with the petitioner in *Eastern*. The facts in *Eastern*, however, differ substantially from those in this case.

In *Eastern*, neither the assigned operator itself nor any of its statutory related persons was signatory to any coal wage agreement after 1965. Because Eastern did not sign any 1974 or later NBCWA that explicitly referred to retiree health benefits or lifetime coverage, the plurality and Justice Kennedy concluded that Eastern's participation in the UMWA multiemployer plans did not contribute to any legitimate expectation of lifetime health benefits for eligible coal industry retirees. Here, by contrast, it is undisputed that respondent Jericol signed the 1974 NBCWA, and thus joined in the industry-wide commitment to provide lifetime health coverage for eligible retirees and their dependents, including the retirees of Jericol's corporate predecessor. *Eastern*, 524 U.S. at 509.



In applying the statutory priorities set forth in Section 9706, SSA may assign Combined Fund beneficiaries to any signatory operator that remains "in business" or with respect to which a related person remains "in business." 26 U.S.C. § 9706(a). A signatory operator or related person satisfies the Coal Act's "in business" requirement "if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. § 9701(c)(7).

To facilitate its assignment task under the Coal Act, SSA developed a Program Operations Manual System ("POMS") that included numerous transmittals of internal instructions, as well as supplemental Coal Act review instructions that were intended to be used in conjunction with POMS. The internal instructions were intended to set forth the policies and procedures to be used by SSA in making assignments under the Coal Act. Supplemental instructions, in turn, were used to clarify or modify earlier guidelines and to provide expanded procedures for processing administrative reviews of Coal Act assignments.

In July 1995, in its Supplemental Coal Act Review Instruction # 4, SSA set forth its specific policy concerning the assignment of beneficiaries to "successors" and "successors-in-interest." The Instruction stated:

> Although there is a provision in the Coal Act for assignments to "successors" and "successors-in-interest" to "related persons," the Coal Act does not specifically provide for assignments to "successors" or "successors-in-interest" to signatory operators. However, the Coal Act does permit assignments to "successors" and "successors-in-interest" to *defunct* (inactive) signatory operators.

Pet. App. 85a-86a. SSA reasoned that "[b]ased on the above, 'successors' and 'successors-in-interest' are another type of 'related person,' and are to be treated as a 'related person' for purposes of making assignments under the Coal Act." *Id.* at 86a. The agency then provided the following definition for Coal Act purposes (*id.*):

> 1. A "successor" (this includes the "successor-in-interest") is one who:
>
> – by purchase, merger, consolidation, or other means of transfer, acquires substantial assets from another; AND
>
> – continues running the same operation in the same location as the former owner with little or no interruption; AND
>
> – uses many of the same employees who worked for the former owner.

**F. Assignments to Jericol**

The underlying facts that led to the Combined Fund assignments at issue here typify corporate transactions that occur on a routine basis in the coal industry. In 1973, Shackleford Coal Company ("Shackleford One"), a signatory to the 1971 NBCWA, sold its operating assets, transferred "all of its rights" under various "contracts and commitments," and sold the right to use the Shackleford name to a newly formed company named Irdell Mining, Inc. ("Irdell"). Pet. App. 10a-11a, 68a-69a. *See also* R. 34-57.[9] Thereafter, Shackleford One changed its name to Kelley & Associates, Inc., and soon dissolved. Pet. App. 10a. After this asset purchase, Irdell changed its name to Shackleford ("Shackleford Two") and immediately started operating in the same location as Shackleford One with almost all of Shackleford One's employees, including members of Shackleford One's management. *Id.* at 10a-11a. *See also* R. 211-212, 217. Shackleford Two also assumed Shackleford One's obligations under the 1971 NBCWA. The secretary of Shackleford One, after becoming vice-president of Shackleford Two, signed the 1974 NBCWA on behalf of Shackleford Two. R. 217. In 1977, Shackleford Two changed its name to Jericol Mining, Inc. R. 212.

SSA relied on the above facts in assigning more than 80 Combined Fund beneficiaries to Jericol based on employment with Shackleford One. Specifically, the agency concluded that because "Jericol adopted use of the Shackleford name, continued to operate under Shackleford's UMWA agreement and otherwise acted as its successor" it was Shackleford One's successor for purposes of assigning Coal Act liability. Pet. App. 12a, 57a. Jericol filed this action, seeking review of SSA's determination.

The district court ruled that, although the Coal Act authorizes assignments of Combined Fund beneficiaries to successors in interest of related persons to signatory operators, its does not authorize such assignments to successors in interest of signatory operators themselves. Pet. App. 74a-78a. A divided panel of the court of appeals affirmed. Pet. App. 23a-36a. Judge Murnaghan dissented. He explained that he

[9] "R." refers to the parties' Joint Appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

"disagree[d] with the majority's theory because it presumes that Congress intended to promote the exact practice that necessitated legislative action in the first place." Pet. App. 42a. In light of the history leading to the Coal Act, Judge Murnaghan found it "unimaginable that Congress could have intended to promote the sale of coal companies to successors who would not be liable for Fund benefits." *Id.* He concluded that "[e]xcluding successors in interest to signatory operators from liability for Fund benefits is plainly inconsistent with Congress's intent in enacting the Coal Act." *Id.* at 44a.

## SUMMARY OF ARGUMENT

The court of appeals erred in concluding that the Coal Act does not permit SSA to assign Combined Fund beneficiaries to a direct successor of an out-of-business signatory operator. The court's conclusion is incorrect for several reasons.

First, the Coal Act's language, although not as clear as it might have been, can be read, as SSA has done, to permit the assignment of Combined Fund beneficiaries to successors of signatory operators. That is so both because the statutory definition of "related persons" is broad enough to include successors in interest of signatory operators and because the statutory term "signatory operator" itself includes, under generally applicable rules of statutory construction, a successor in interest to such an operator. Second, the interpretation adopted by SSA is the only one consistent with both the broad remedial goal of the Coal Act and the congressional decision to provide as wide a funding base as possible for the Combined Fund. Third, the agency's reading of the statute, unlike the interpretation adopted by the court below, is also consistent with the principles of statutory construction, endorsed by this Court, that require statutory language to be read in its proper context, consistent with the specific regulatory scheme of which



it is a part. Fourth, the relevant legislative history provides further support for the interpretation adopted by SSA. Fifth, the statutory interpretation adopted by the panel majority would create a serious possibility that companies liable under the Coal Act would seek to use the device of a successor firm to evade their statutory obligations. If this were to happen, the financial crisis that Congress addressed through enactment of the Coal Act would reemerge. The funding base for retiree health benefits would again begin to shrink with fewer and fewer coal operators responsible for the health benefits of the affected beneficiaries. Finally, an interpretation of the Coal Act that allows assignments to a direct successor to a signatory operator is consistent with the result reached by federal courts when presented with a similar question of statutory construction under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* (1980) ("CERCLA"), another federal statute with a broad remedial goal. Although CERCLA did not expressly address successor liability, every federal court that has considered the question has sustained the propriety of such liability under the Act.

## ARGUMENT

### I. THE PLAIN LANGUAGE AND PURPOSE OF THE COAL ACT SUPPORT THE ASSIGNMENT OF COMBINED FUND BENEFICIARIES TO DIRECT SUCCESSORS TO SIGNATORY OPERATORS

In *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), this Court explained that the first task in reviewing an agency interpretation of a statute is to determine "whether Congress has directly spoken to the precise question at issue." This initial inquiry into

congressional intent, however, requires more than merely "examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). Statutory language cannot be read in a vacuum because "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Id.* at 132. "A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *Id.* at 133.

Likewise, the purpose of a statute plays a pivotal role in ascertaining congressional intent. Therefore, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest sign to their meaning." *Public Citizen v. U.S. Dep't. of Justice*, 491 U.S. 440, 454-55 (1989) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.)(L. Hand, J.), *aff'd*, 326 U.S. 404 (1945)).

This Court has cautioned that "the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Public Citizen*, 491 U.S. at 455 (citing *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928)(Holmes, J.)). This is particularly true where the "naked text" of a statute, when read in isolation, would produce a result "difficult to fathom or where it seems inconsistent with Congress' intention." *Public Citizen*, 491 U.S. at 455.

Here, the panel majority claimed that reading the Coal Act's "related person" provision to include a direct successor to a signatory operator would "require us to completely ignore the statutory context and read the phrase 'signatory operator' in a vacuum." Pet. App. 24a. In fact, however, the panel majority committed the very error about which it warned, when it failed to give adequate weight to the statute's broad remedial purpose,



its expansive scheme of liability, and its relevant legislative history.

As defined in the Coal Act, "related persons" include members of a "controlled group of corporations" that includes the signatory operator, and "a trade or business which is under common control" with the signatory operator. The term also includes a "successor in interest of any person described" elsewhere in the definition. The definition of "related persons" is sufficiently broad to include the signatory operator itself. For example, a signatory operator is, by definition, a member of a controlled group of corporations that includes the signatory operator (just as a father or mother is, by definition, a member of the family that includes that person). At a minimum, the signatory operator itself can qualify as a "person described" in clause (i), (ii), or (iii) of Section 9701(c)(2)(A), in the sense that the signatory operator itself is explicitly mentioned in each of those clauses. Either way, if the signatory operator is considered "related" to itself, or if it is considered a "person described" in one or more of the explicitly enumerated categories of "related persons," a successor to the signatory operator would qualify as a "related person" under the statutory definition.

Although, the majority ruled that this reading of Section 9701(c)(2)(A), adopted by SSA, "would produce a nonsensical definition of 'related person'" (Pet. App. 25a), SSA's interpretation of the statutory provision is not unreasonable, and that interpretation is the only one that produces results consistent with Congress' intent in passing the Coal Act.

Congress recognized that a major cause of the funding problems faced by the existing multiemployer plans was signatory operators going out of business or transferring operations to a new entity, thus rendering their former employees "orphans," and leaving them behind in the collectively bargained multiemployer system to obtain benefits

financed by other employers. To address this situation, Congress imposed Coal Act liability on a broad range of entities, including current and former signatory operators, related persons, and successors to such entities. *See* 26 U.S.C. §§ 9701(c), 9706(a), 9711(c), (g), 9712(d).

By assigning Combined Fund liabilitiy to a successor of a signatory operator, as a "related person" under the statute, SSA properly implemented Congress' intent that the definition of "related persons" be construed broadly to find a specific obligor for as many beneficiaries as possible. The alternative reading adopted below produces illogical consequences that neither respondents nor the panel majority can plausibly explain. It is undisputed that the Coal Act expressly authorizes imposition of Combined Fund liability on successors in interest to related persons of signatory operators. Yet, the court of appeals held, the statute stops short of permitting such liability for successors in interest of signatory operators themselves. There is no evidence that Congress intended to produce this peculiar result, as the only other courts of appeals to address the issue have recognized. *See R.G. Johnson Co., Inc. v. Apfel*, 172 F.3d 890, 895 (D.C. Cir. 1999); *Aloe Energy Corp. v. Apfel*, No. 99-3915 (3d Cir. June 20, 2000), *cert. pending*, No. 00-725 (docketed Nov. 7, 2000).

And that is not the only anomaly created by the decision below. It is undisputed that, where individual employer plans and the 1992 Plan are concerned, the Coal Act explicitly makes successors in interest of signatory operators liable to the same extent as the signatory operators themselves. 26 U.S.C. § 9711(g)(1). There is no logical reason why Congress would have wanted to adopt that approach with respect to individual employer plans and the 1992 Plan but not with respect to the Combined Fund. Nor is there the slightest hint anywhere in the legislative material leading to the Coal Act that Congress had any such intent.



In fact, to the extent that the legislative history of the Coal Act bears on the subject at all, it supports SSA's interpretation. The proposed conference report, introduced by Senator Wallop immediately before passage of the Act, stated that the statute was "designed to allocate the greatest number of beneficiaries in the [collectively bargained] Plans to a prior responsible operator." 138 Cong. Record S17603 (daily ed. Oct. 8, 1992). To accomplish this goal "definitions are intended by the drafters to be given a broad interpretation." *Id.* The report further explained that "because of complex corporate structures which are often found in the coal industry, the number of entities made jointly and severally liable for a signatory operator's obligations under the definition of related person is intentionally broad." *Id.* at S17604.

Senator Rockefeller, the principal sponsor of the Coal Act, confirmed the correctness of SSA's approach in floor remarks shortly before the Senate's vote on the statute. In the course of clarifying a number of technical points, Senator Rockefeller stated that "the term 'signatory operator,' as defined in new section 9701(c)(1), includes a successor in interest of such operator." 138 Cong. Rec. S17634 (daily ed. Oct. 8, 1992) (statement of Sen. Rockefeller). As the principal sponsor of the Coal Act, Senator Rockefeller's remarks are entitled to special weight. *See, e.g., North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982) (remarks by the sponsor of legislation "are an authoritative guide to the statute's construction"); *Simpson v. United States*, 435 U.S. 6, 13-15 (1978) (same); *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964) (same).

The panel majority erred in concluding that Senator Rockefeller's statement offered "limited" guidance because it was "directed at the definition of 'signatory operator' as opposed to 'related person.'" Pet. App. 29a-30a. If anything, Senator Rockefeller's statement demonstrates that the

appropriate result can be achieved here even without regard to the agency interpretation of "related persons" that the court of appeals regarded as too strained. Moreover, Senator Rockefeller's statement concerning Congress' intended meaning of "signatory operator" is completely consistent with general rules of statutory construction applicable to all federal statutes.

Section 9701(c)(1) defines "signatory operator" as "a person which is or was a signatory to a coal wage agreement." Congress, however, did not define "person" in the Coal Act. Title 1 of the U.S. Code provides that the word "person" includes "corporations, companies, associations, firms, partnerships . . . as well as individuals." 1 U.S.C. § 1. Section 5 of Title 1 states that "the word 'company' or 'association', when used in reference to a corporation, shall be deemed to embrace the words, 'successors and assigns of such company or association', in like manner as if these last-named words or words of similar import, were expressed." 1 U.S.C. § 5. Title 1 further provides that the general rules of construction apply in determining "the meaning of any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1. Here, nothing in the context of the Coal Act provides any indication that the normal rules of statutory construction should not apply.

When the term "signatory operator" is read using the general provisions of the U.S. Code as a guide to Congress' intended meaning, it is clear that "signatory operator" is a person, which includes a company or association, as well as any successors and assigns of such company or association. Application of these rules of statutory construction supports the conclusion that Congress intended the Coal Act to apply to a successor of a signatory operator. Contrary to the view of the panel majority, this is not a case in which SSA and the Trustees seek to use legislative history to "displace the language of the statute . . . ." Pet. App. 31a. Rather, when that language is read in context, and according to ordinary rules of statutory



construction, the result is fully consistent with the interpretation adopted by the agency and endorsed by the Act's chief sponsor.

The panel majority is also incorrect in drawing a negative conclusion about successor liability to the Combined Fund from the express statutory acknowledgment of such liability in the context of individual employer plans and the 1992 Plan. Pet. App. 31a; 26 U.S.C. § 9711(g)(1). Particularly absent any plausible explanation for why Congress would have wanted to adopt different successor rules for the Combined Fund, and in the teeth of a contrary statement by the Act's principal sponsor, the panel majority accorded excessive weight to the "negative pregnant" kind of argument.

This Court has cautioned that such an argument "should not be elevated to the level of interpretative trump card." *Field v. Mans*, 516 U.S. 59, 67 (1995). Moreover, this Court recognized that such an approach to statutory construction is "weakest when it suggests results strangely at odds with other textual pointers." *Id.* at 75. After considering the purpose and history of the statute and "common sense," this Court concluded in *Field* that, although Congress failed to include a particular requirement in one part of a statute, it did not intend purposely to exclude that requirement from the relevant provision. *Id.* at 67-69.

The same approach should govern here. Congress could not have deliberately intended to insulate direct successors of signatory operators from the reach of Combined Fund liability, while at the same time (a) allowing such liability to pass through to entities with a much more tenuous connection to the signatory operator (*i.e.*, successors to related persons), and (b) expressly imposing 1992 Plan and individual employer plan liability on direct successors to signatory operators. As the D.C. Circuit and the Third Circuit have recognized, the result advocated by respondents undermines the unquestioned purpose of the statute and does so through silence, with no apparent

explanation and no statement from anyone in Congress that this is the intended outcome. The "plain meaning" rule should not be used as a path to such an illogical result.

## II. SSA'S INTERPRETATION OF THE COAL ACT'S "RELATED PERSONS" PROVISION IS ENTITLED TO DEFERENCE

Congress entrusted SSA with the enormous task of assigning more than 100,000 Combined Fund beneficiaries, and dealing with the myriad variety of corporate relationships and employment histories that that task inevitably implicated. SSA, in carrying out its assignment responsibilities, reasonably interpreted the statute to authorize assignments to successors like Jericol when the signatory operator that employed the retirees in question was no longer in business. That interpretation is entitled to substantial deference. *United States v. Mead Corp.*, No. 99-1434 (June 18, 2001), slip op. 8, 9, 15-16 (citing *Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944)); *Chevron*, 467 U.S. at 844. Under this deferential treatment, the agency's determination may be disturbed only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

In *Chevron*, this Court explained that "if a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. In determining whether the agency offers a permissible construction of the statute, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11 (citing *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981)).



Deference has been granted to SSA by courts of appeals in a number of cases concerning the agency's interpretation and administration of the Coal Act. *See Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1251-52 (D.C. Cir. 1998)(holding that SSA's interpretation of the term "coal industry," as used in the Coal Act, is reasonable and should be upheld); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688, 691-93 (3d Cir. 1996) (according deference to SSA's internal guidelines defining Coal Act term "in business."). Such deference also should extend to the agency interpretation of the Coal Act's "related persons" provision.

## III. SSA'S INTERPRETATION OF THE COAL ACT'S "RELATED PERSONS" PROVISION AVOIDS AN ABSURD RESULT NOT INTENDED BY CONGRESS

Even if this Court were to conclude, contrary to what we have argued above, that a literal reading of the statutory language favors respondents, SSA's position still should prevail. This Court has held that a literal reading of statutory language should not be followed if it "will produce a result demonstrably at odds with the intentions of the drafters," *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989), or if it would lead to an absurd result. *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930). That is just what the court of appeals decision would do, as two other courts of appeals have acknowledged in reaching a contrary conclusion on the same issue. *R.G. Johnson*, 172 F.3d 895; *Aloe*, 00-725 Pet. App. 8a.

The panel majority declared that it was "not persuaded that there is no logic to shielding successors in interest to signatory operators from liability but not successors in interest to 'related persons.'" Pet. App. 32a. The majority then suggests that such an odd result may be explained as a means of

promoting the sale of coal companies. *Id.* at 32a-33a. As Judge Murnaghan explained in dissent, however, "excluding successors in interest from liability for retiree benefits does more than *promote* the sale of coal companies; it *actively encourages* the sale of coal companies" as a means of avoiding liability under the Coal Act. Pet. App. 42a. The result, as the dissent accurately observed, is that

> [t]he remaining signatory operators will have to shoulder the burden of paying for the retirees of signatories who leave the business, further raising their costs of doing business; the additional costs will, in turn, encourage more signatories to sell their assets to successors. The ultimate result would be the same dwindling funding base that Congress intended to rectify by passing the Act.

*Id.* at 43a. *See also R.G. Johnson*, 172 F.3d at 895 ("Nor are we impressed by our dissenting colleague's suggestion . . . that Congress could have intended to benefit coal miners by eliminating the impediment to the sale of a coal company posed by the potential liabilities created by the Coal Act.").[10]

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[10]Judge Murnaghan aptly answered respondents' effort to minimize the potential significance of acceptance of their position:

> Some might suggest that coal companies are unlikely to attempt to profit from such a "loophole" in the Coal Act; however, this suggestion ignores the fact that coal companies have a long history of using the tools of successorship to maximize shareholder profits at the expense of workers and retirees.



Not only would the panel majority's approach threaten to re-create the problem that the Coal Act was intended to solve, but it does not even make sense on its own terms. The majority provides no explanation for why Congress was concerned with promoting the sale of coal companies to direct successors, but was not concerned with encouraging the sale of coal companies to successors in interest to related persons. Such a result is not just "somewhat anomalous," as the majority suggests; it is an incongruous outcome that cannot be reconciled with the intent of Congress.[11]

Respondents have attempted to argue that a substantial increase in the number of unassigned beneficiaries will cause no great concern to the government, the Combined Fund, or the retirees themselves. Br. in Opp. 14-15. According to respondents, health care benefits for such unassigned beneficiaries will be financed by funds transferred from the AML Fund, and no one will be harmed. The argument is misguided, for several reasons.

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Pet. App. 43a n.4 (citing Grant Crandall, et al., *Hiding Behind the Corporate Veil: Employer Abuse of the Corporate Form to Avoid or Deny Workers' Collectively Bargained and Statutory Rights*, 100 W.Va. L. Rev. 537 (1998)).

[11]The panel majority likewise offers no explanation for why Congress included successors of signatory operators in Section 9711(g)(1) of the Coal Act, which applies to the UMWA 1992 Benefit Plan and individual employer plans, but allegedly excluded successors of signatory operators from SSA's assignment of Combined Fund beneficiaries. If Congress really intended to encourage the sale of coal companies by excluding successors in interest from Coal Act liability, why would it not have excluded successors from liability to individual employer plans and the 1992 Plan as well?

First, AML Fund monies are not available for the Combined Fund's first three plan years. 26 U.S.C. § 9705(b). If the beneficiary assignments at issue here are declared invalid, the number of unassigned beneficiaries will be increased as of February 1, 1993, and the remaining assigned operators will be assessed additional premiums, as they were when SSA declared several thousand beneficiary assignments void in the aftermath of *Eastern*. Second, even for the years when AML Fund transfers are available under the Coal Act, the amount of money that can be transferred annually is not unlimited. It is capped by the amount of interest earned by the AML Fund or $70 million, whichever is greater. The number of unassigned beneficiaries in the Combined Fund already is sufficient to exhaust, or nearly exhaust, the annual sums available from the AML Fund, and any significant increase in the number of unassigned beneficiaries predictably will lead to the assessment of an unassigned beneficiaries premium against the remaining assigned operators – operators who have no connection to such newly unassigned beneficiaries or their former employers. 26 U.S.C. § 9704(a)(3), (d). Third, even assuming the available AML Fund monies were unlimited, they are public funds, earmarked for an entirely different purpose (namely, the reclamation of abandoned surface mines) under the Surface Mining Control and Reclamation Act of 1977. Congress has chosen in the Coal Act to make some of these funds available for the health care of retired miners and their dependents, but that is no justification for encouraging employers covered by the Act to "dump" their beneficiaries so that their health coverage can be provided through the public fisc.



## IV. SUCCESSOR LIABILITY IN THE CONTEXT OF CERCLA PROVIDES ADDITIONAL SUPPORT FOR SSA'S ASSIGNMENT OF COAL ACT LIABILITIES TO DIRECT SUCCESSORS OF SIGNATORY OPERATORS

In a highly analogous context, several courts of appeals, including the Fourth Circuit, have relied on accepted rules of statutory construction and established concepts of corporate law to hold successors liable for hazardous waste cleanup costs imposed by CERCLA, even though CERCLA does not expressly provide for successor liability. *See United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991); *Smith Land & Improvement Corp. v. Celotex Corp* , 851 F.2d 86, 91-92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). The reasoning of these courts, when applied to the question of successor liability under the Coal Act, provides additional support for SSA's assignments to Jericol.

Congress enacted CERCLA to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems with abandoned and inactive hazardous waste disposal sites." *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990). CERCLA, however, does not expressly include successors in its statutory scheme of liability. Instead, in the statutory provision discussing "covered persons," it refers simply to the "owner" and "operator" of any facility at which hazardous substances were disposed. 42 U.S.C. § 9607(a)(1)-(2). Based upon this statutory language, entities have sought to avoid CERCLA liability by arguing that as successors they do

not satisfy the statutory definition of "covered person." This argument has failed.

The panel majority rejected the CERCLA analogy because CERCLA is a "separate" statute "unrelated" to the Coal Act. Pet. App. 35 n.7. This misses the point. Here, as in CERCLA, Congress has enacted a broad, remedial statute. The underlying purpose of both statutes is to identify those entities most responsible for a problem Congress sought to rectify. Just as CERCLA permits a successor to be held liable because "Congress has emphasized funding by responsible parties," *Smith Land & Improvement Corp.*, 851 F.2d at 91, so too does the Coal Act permit assignment of Combined Fund liability to a successor to a signatory operator because Congress emphasized funding by the "persons most responsible for plan liabilities." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037 (codified in 26 U.S.C. § 9701 (historical note)(1994)). Here, the benefits of the miners' labor inured to Jericol as a successor to Shackleford, and it is the "most responsible party" to shoulder the Combined Fund liability.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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LARRY G. MASSANARI,
ACTING COMMISSIONER OF SOCIAL SECURITY,
*Petitioner,*

v.

SIGMON COAL COMPANY, INC., and
JERICOL MINING, INC.,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF OF *AMICUS CURIAE* THE UNITED MINE WORKERS OF AMERICA IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST

The United Mine Workers of America (the "UMWA" or "Union"), an international labor organization of approximately one hundred and twenty thousand members, is dedicated to representing the interests of the nation's coal miners and their families.[1] Since its creation in 1890, the UMWA has sought to secure for miners safe and just working conditions, fair wages, comprehensive, quality health care, and opportunities for gainful and humane employment in the nation's coal mines, processing plants and associated facilities. One of the UMWA's proudest accomplishments is helping to secure the passage of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), *codified in relevant part at,* 26 U.S.C.§§ 9701 *et seq.*

On its face, the Coal Act appears to be a revolutionary new concept in the preservation of health care for retired UMWA members and their dependents. Upon close examination, however, it is clear that the Act is not so much a radical event, as it is the culmination of a long and arduous history of promises made, broken, and finally kept, as coal operators continually attempted to evade and avoid their collective bargaining and health care obligations. In order to appreciate fully the purpose and intent of the Coal Act, it is necessary to understand the practices of employers in the nation's coal fields that finally compelled Congress to intervene and secure the health care of these retirees.

---

[1]Counsel for all parties have consented to the filing of this *amicus* brief, and the UMWA has filed those consents with the Clerk of the Court. Sup. Ct. R. 37.3. No counsel for a party authored this brief in whole or in part. No person or entity other than the UMWA has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

Throughout its history, the UMWA has endured contentious labor-management relations. *See generally*, Maier B. Fox, *United We Stand, The United Mine Workers of America 1890-1990* (1990); *Gateway Coal Co. v. UMWA*, 414 U.S. 368, 388-89 (1974)(Douglas, J., dissenting) (describing the "reckless disregard for the miner's safety [that] permeates the history of [the coal] industry" and the job of coal mining as "the most dangerous occupation in America"); *United States v. UMWA*, 330 U.S. 258 (1947) (discussing government takeover of mines). Additionally, the nature of coal mining – extracting a finite, non-renewable product from limited openings in the earth – creates an inherently unstable economic atmosphere. Consequently, coal industry employers are notorious for opening and shutting down operations because of effects on their profitability due to geological difficulties, environmental regulation, fluctuations in the price of coal and its transportation, and consumer demands. Rather than honor the contractual commitments they made in collective bargaining, however, many employers have a lengthy history of utilizing creative corporate maneuvers to evade and avoid unwanted liabilities, particularly those related to health care, in order to maximize profits at the expense of their employees. It was against this factual background that Congress created the Coal Act.

The question presented by Petitioner is whether Congress succeeded in its efforts to close one of the coal operators' principal avenues of escape by holding a successor in interest to a signatory operator liable for retiree health care under the terms of the Coal Act, or whether the intent of Congress will be frustrated by creating another substantial loophole in the comprehensive statutory scheme.



In view of its institutional knowledge of the collective bargaining history within the coal mining industry, and its first hand experience with the unfettered creativity of coal operators, the UMWA can provide the Court with valuable insight into the question raised by this case. *See* Grant Crandall, *et al.*, *Hiding Behind the Corporate Veil: Employer Abuse of the Corporate Form to Avoid or Deny Workers' Collectively Bargained and Statutory Rights*, 100 W.Va. L. Rev. 537 (1998). Additionally, the matter before the Court directly involves the continued provision of health benefits to hundreds of retired coal miners and their dependents as well as indirectly the health benefits of tens of thousands of other retired coal miners and their spouses and dependents. These retirees were, and many still are, members of the UMWA. Inasmuch as the question raised by the Petition will be addressed at length by others, the UMWA's submission focuses primarily on an explication and amplification of the factual background of the Coal Act. The UMWA, as *amicus curiae*, submits its brief in support of the Petitioner to reverse the holding of the Fourth Circuit Court of Appeals and to uphold the rulings issued by the District of Columbia and Third Circuit Courts of Appeals.

## STATEMENT OF THE CASE

Coal mining has played a significant role in the industrial history of our nation. It was the fuel which powered the industrial explosion that altered our national landscape. For example, at the turn of the nineteenth century, the rapidly expanding iron and steel industries relied heavily on coal to light their furnaces. During this period, coal reserves were plentiful and mined mainly by recent immigrants compelled to work underground for long hours in abysmal

and unsafe conditions. As recognized by the President's Commission on Coal, "[c]oal is unique among the major energy resources in its close identification with the people who produce it." *The President's Commission on Coal, The American Coal Miner: A Report on Community and Living Conditions in the Coalfields*, iv (1980) (the "*President's Commission*"). Unlike other industries "coal and the coal miner are intertwined in American legend and history." *Id.*

Our national dependence on coal escalated throughout the twentieth century and the number of coal miners swelled to over half a million in 1950. *Coal Commission Report: A Report to the Secretary of Labor and the American People (Nov. 1990), p. 12, Figure 2 ("Coal Comm'n Report")*. This report was reprinted, and its findings were discussed, in the *Coal Commission Report on Health Benefits of Retired Coal Miners, Hearing before the Subcommittee on Medicare and Long-Term Care of the Committee of Finance*, S. Hrg. 102-524 Cong., 1st Sess., Sept. 25, 1991. During our nation's involvement in both World Wars, the continued and uninterrupted production of coal was absolutely critical to the success of the nation's war efforts. After the second World War, however, traditional coal mining jobs declined significantly due to increased mechanization. Moreover, following the end of the energy crisis in the 1970's, the price of coal fell to near record lows and the coal industry suffered a significant retraction. *Coal Comm'n Report*, pp. 11-12.

Throughout this changing history, job security and opportunity has long been a primary concern for UMWA members. Coal miners face severe economic instability because their jobs depend on the ability of coal operators to locate, recover and profitably sell a limited, non-renewable energy source. The mining and processing of coal is affected



by a variety of forces, including physical difficulties which may be encountered from time to time in extracting coal from a particular seam, governmental regulation of permissible sulphur content, fluctuating transportation costs, and significant fluctuations in the market price for coal, all of which affect production and profitability on an ongoing basis. As mining firms continually start up and shut down coal mining and coal processing operations at various locations in response to these forces, and as companies continually acquire and dispose of mining facilities, workers who both mine and process the coal go through periods of intense activity and prolonged layoffs. Thus, the UMWA has continually strived to maintain economic security in this extractive industry and has long included in its national collective bargaining agreement detailed seniority and recall provisions designed to mitigate the job insecurity faced by employees in this industry.

Over the years, however, the competitive pressures of the industry led coal operators to target the UMWA and its hard-won gains for its members as a means of reducing costs. Coal operators began using increasingly aggressive and creative tactics to shed their collective bargaining obligations in order to maximize profits. Chief among these tactics was, and is, the manipulation of the corporate successor principles. This problem became particularly acute in the mid-1970's following two Supreme Court decisions interpreting federal labor laws relating to successor employers.

In *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 291 (1972), this Court determined that a successor employer is not obligated to assume its predecessor's collective bargaining agreement even though the successor is doing the same work in the same place with the same

employees as its predecessor. Two years later in *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 260 (1974), this Court held that the existence of a successorship clause in collective bargaining agreements between a union and an employer does not bind a successor employer to the agreement and that the successor employer is free to refuse to assume any obligations under the agreement.

Following these decisions, it became clear that a successorship clause simply declaring a contract binding on the signatory employer and its "successors and assigns" was of limited benefit because it could not be enforced effectively against a successor entity. These cases were especially troubling to the UMWA because, as stated above, a coal miner's employment depends on the profitable location and recovery of a limited resource. Additionally, the UMWA was particularly concerned about the effect of these cases on its ability to continue to ensure health care coverage to its active and retired members at a time when health care costs were beginning to rise and the collectively-bargained employee health care funds saw an influx of new workers due to the energy crisis.

Accordingly, in entering negotiations for the 1974 national contract, the UMWA wanted to assure that the interests of its membership were protected from any operation being sold, transferred or otherwise moved from one entity to another. The product of the 1974 bargaining efforts was an active successorship provision found in Article I of the UMWA National Bituminous Coal Wage Agreement ("NBCWA") which provides in relevant part:

> [The] Employer promise[s] that its operations covered by this Agreement shall not be sold,



> conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.

By reason of this provision, signatory operators were bound to secure the commitment of the successor to accept and comply with the extant collective bargaining agreement.

In the 1974 NBCWA, the Union and its contracting employers also made a number of changes to the existing program of health and retirement benefits. First, they agreed to divide the old United Mine Workers of America Welfare and Retirement Fund of 1950 into four separate multiemployer plans. Two of the new plans provided pension benefits to retired miners. The other two plans – the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan – provided health benefits to retired miners.[2] The new 1974 Benefit Plan contained a negotiated plan of benefits that replaced the Trustee-established benefit levels and also made express reference to the lifetime commitment of health care for retired miners, their spouses, and certain dependents.

In 1977, the coal operators demanded that the 1974 Benefit Plan be eliminated and that all health care be provided directly by the individual employers. The parties failed to reach agreement on this issue and a protracted strike ensued. *District 17, UMWA v. Allied Corp.*, 765 F.2d 412 (4th Cir. 1985)(*en banc*).

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[2]The UMWA 1974 Benefit Trust also provided health care to working coal miners.

The 1977-78 strike was settled with a compromise that retained the 1974 Benefit Plan, but changed its function.[3] Under the 1978 NBCWA, working miners and miners who retired on or after January 1, 1976 generally would receive their health benefits from single employer plans maintained by their employers. *See Davon, Inc. v. Shalala*, 75 F.3d 1114, 1118 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996). The 1974 Benefit Plan was retained as an "orphan" plan to provide health benefits on a multiemployer basis to those miners who retired on or after January 1, 1976, but whose former employers were no longer in business. *Coal Comm'n Report*, p. 26.

Additionally, to alleviate the Union's concerns that many coal operators would seek ways to avoid paying for their employees' health care, the parties negotiated the "guarantee" and "evergreen" clauses. The "guarantee" clause was intended to fully guarantee the funding of the benefit and pension funds. Contributing employers were allowed to increase their contributions to the funds, but could not decrease them. *Carbon Fuel Co. v. USX Corp.*, 891 F. Supp. 1186, 1190 (S.D. W. Va. 1995), *aff'd*, 100 F.3d 1124 (4th Cir. 1996). The "evergreen" clause was designed to impose a permanent obligation on employers to contribute to the various pension and benefit plans. *Id. See also UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993).

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[3]This dispute affected so much of the nation's economy that President Carter appointed a Presidential Coal Commission to examine the issues that had precipitated the strike, including "health, safety and living conditions in the Nation's coal fields." *Coal Comm'n Report*, p. 27.



The ink had barely dried on this agreement before coal operators resumed their practice of shirking their contractual responsibilities for providing health care to their former employees. For example, Allied Corporation, a large energy company doing business in West Virginia, sold its mining operations during the term of the 1978 NBCWA, but failed to abide by the successorship provision requiring it to secure the agreement of the purchaser to assume the collective bargaining agreement with the UMWA, including Allied's obligations to provide health care. Allied did not sign the 1981 NBCWA. The district court ruled that Allied's obligation to provide health care to its employees did not terminate with the expiration of the 1978 NBCWA, and even if it did, Allied was still liable because it had breached the successorship clause. Thus, Allied was obligated to provide health care coverage to its retirees until it could negotiate with the purchasers to provide the coverage.

On appeal, the Fourth Circuit reversed. On rehearing *en banc*, however, the Court of Appeals held that the district court was correct in ordering Allied to provide health care benefits because it has breached the successorship clause, but suggested that the lower court many have erred in ruling that a coal employer's contractual obligation to provide such benefits continues beyond the term of the NBCWA. *District 17, UMWA v. Allied Corp.*, 765 F.2d 412 (4th Cir. 1985)(*en banc*).

Consistent with their history of evading their obligations, dozens of coal companies then sought to take advantage of the Fourth Circuit's *dicta* and refused to sign a successor NBCWA in the hopes of releasing themselves from liability for their coal employees' health care.

In *District 29, UMWA v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985) ("Royal I"), the Fourth Circuit revisited the issue of whether an employer's obligation for health care survived the life of the collective bargaining agreement and concluded that it does not. In a subsequent decision involving Royal, however, the Court also found that the 1974 Benefit Plan had sole responsibility for providing health benefits to those employees whose employers had left the coal mining industry, and who were no longer signatory to an agreement requiring them to provide benefits, even though they remained financially able to provide those benefits. *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280, 283 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) ("Royal II"); *see also UMWA v. Nobel*, 720 F. Supp. 1169, 1176 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). As a result of these decisions, the 1974 Benefit Plan was left in the unfortunate position of having to provide health care to a growing number of beneficiaries but without a funding source. *See also In re Chateaugay Corp.*, 945 F.2d 1205 (2d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1991)(LTV successfully sued to establish that 1974 Plan, and not LTV, was responsible to provide health care to LTV's coal industry retirees and their dependents).

With these cases, more and more employers tried to escape through this "latent loophole" by refusing to sign a successor NBCWA, thereby terminating their individual employer health plans, and "dumping" the cost of health care for their retired employees on the 1974 Benefit Plan. *In re Chateaugay Corp.*, 53 F.3d 478, 484 (2d Cir. 1995), *cert. denied*, 516 U.S. 913 (1995); *see also Coal Comm'n Report*, p. 62 ("[d]umping liability is fatal to any multi-employer fund"). Consequently, the 1950 and 1974 Benefit Plans



began to experience considerable financial instability as a result of efforts by employers to reduce or eliminate their contribution and benefit obligations to the UMWA health care system.

Meanwhile, despite the broad successorship clause negotiated in 1974, coal operators renewed their efforts to get out from under their contractual obligations (particularly their retiree health care obligations as they are the most expensive) by shifting production arrangements from signatory operators to leased mine or subcontracting arrangements. The signatory operators then decreased or ceased coal production entirely at their mines, causing mass layoffs, and began purchasing coal mined from their own reserves by non-signatory lessees or subcontractors.[4]

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[4]For example, the Union spent years pursuing Basin Cooperative Services ("Basin") to force it to honor the contract's successorship provision and fulfill its workers' contractual expectations. For years, Basin had served its parent company, Basin Electric Power Cooperative ("Basin Electric"), an eight-state network of about 140 rural electric cooperatives, which had an ongoing and constant need for coal. To rid itself of its UMWA obligations, Basin devised a simple plan: It sold its contractually-covered coal reserves (with an expected mining life of nearly twenty years) to a non-union company, which then mined the coal and sold it back to Basin Electric. After a jury trial, the Union, which had sought approximately $12 million in damages, won a judgment of $6.5 million which was upheld on appeal. *See UMWA v. Basin Cooperative Services*, 53 F.3d 222, 225 (8th Cir. 1995).

To address this new form of corporate manipulation, the UMWA, in 1984, negotiated a work preservation clause requiring the signatory employer to secure from the leasing or subcontracting employer an agreement to offer all available jobs of a classified nature to UMWA members. In this regard, the Union hoped to protect members from job displacement that occurred as coal production shifted.

Unfortunately, this newly-negotiated language was still not enough to rid the UMWA of runaway employers and ease the miners' struggle to keep their jobs and their collective bargaining agreements when their work sites were being transferred to other employers. By the late 1980's, the nation's coal fields saw an increasing number of signatory companies opening non-union mines themselves rather than through subcontracting or leasing, in effect, engaging in double-breasting. As signatory companies directed new work away from union operations and into non-union operations, the unemployment rate for union miners climbed ever upward. *See Coal Comm'n Report*, pp. 11-12.

The UMWA attempted to address this continuing assault on its members in its 1988 contract negotiations. In the 1988 NBCWA, the parties agreed that signatory employers would offer three out of five jobs within the bargaining unit classification at their non-signatory mining operations to their bargaining unit employees. Although this provision did not protect against loss of UMWA-represented jobs, it at least provided affected employees with the opportunity to find other work at non-union mines to which their companies had shifted coal production.

Also, in the 1988 agreement, the Union sought to alleviate the growing problem caused by increasing numbers



of employers abandoning their health care commitments by imposing contractual withdrawal liability on companies that seceded from the UMWA multi-employer health care system. Indeed, the issue of continued benefits for over one hundred thousand beneficiaries was one of the primary causes of the bitter 1989 labor dispute between the UMWA and the Pittston Coal Company. The unrest caused by this dispute permeated not only the nation's coal fields, but the entire country. Largely as a result of the retiree health care issue, national and international attention became focused on the Pittston strike. Thousands of UMWA supporters, including labor, religious and civil rights leaders, were arrested during the strike. "It was to be one of the most bitter strikes in recent labor history." *Coal Commission Report on Health Benefits of Retired Miners: Hearing Before the Subcommittee on Medicare and Long-Term Care of the Senate Committee on Finance*, 102d Cong. 102, 319 (Comm. Print 1991).

The escalation of strike activity led Secretary of Labor Elizabeth Dole to become involved in the Pittston strike. After meeting with striking miners and retirees, as well as both Pittston and the UMWA, she announced that she would appoint former Labor Secretary William J. Usery as a "super mediator" to attempt to resolve the strike. Throughout the subsequent negotiations monitored and supervised by Secretary Usery, it became apparent that the problem of retiree health care was incapable of resolution through the collective bargaining process. After the efforts of Secretary Usery, the parties were able to reach a new agreement, although that agreement was subsequently rejected by the UMWA Trusts. *Id.* at 304.

In announcing the agreement, Secretary Dole also announced that she would be appointing a blue ribbon commission to review the health care issues and to make recommendations to resolve them. Secretary Dole subsequently appointed Secretary Usery as the Chair of the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission").

After concluding its review, the Coal Commission determined that

> [t]he escalating cost of providing adequate health care to coal miners and their families, particularly the increasing population of orphan retirees, cannot properly or fairly be solved by the parties through collective bargaining alone.

*Coal Comm'n Report*, p. 3.

Following completion of the Coal Commission's charge, Congress began its own exhaustive examination of the retiree health care crisis. On September 25, 1991, the Subcommittee on Medicare and Long-Term Care of the Senate Finance Committee held a hearing to consider the report and recommendations of the Coal Commission. In his opening remarks, Subcommittee Chairman Rockefeller reiterated that the UMWA benefit trusts were in grave financial condition. Senator Rockefeller also expressed his unequivocal intention to ensure that the broken promises of coal companies would be remedied:

> We are talking about tens of thousands of elderly and often infirm people who long ago



> earned these benefits by firing the furnaces of American industry in war and in peace. *The industry and national commitments to health care for these miners and their families must and will be kept.*

*Coal Commission Report on Health Benefits of Retired Miners: Hearing Before the Subcommittee on Medicare and Long-Term Care of the Senate Committee on Finance*, 102d Cong. 102, 319 (Comm. Print 1991), pp.2-3 (emphasis supplied).[5]

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[5]Congress also heard testimony from UMWA members who had been victimized by the corporate successor maneuverings of coal operators. For example, Homer Eckley testified that:

> I grew up in a coal mining family, four generations of them. That was back when there was no benefits, nothing. I went into the Service and my dad went on strike, and when he came back they had benefits -- pension and hospitalization. I went into the mine with the idea that when my time came, I could retire and have benefits, plus a pension. *Now they tell me that my mine was sold to another company and they are complaining about paying these benefits.*

*Coal Commission Report on Health Benefits of Retired Miners: Hearing Before the Subcommittee on Medicare and Long-Term Care of the Senate Committee on Finance*, 102d Cong. 102, 319 (Comm. Print 1991), p. 5 (emphasis supplied).

After several draft versions of legislation, Congress ultimately enacted the Coal Act and President Bush signed it into law on October 24, 1992.

In the meantime, while the Union had been focused on its dispute with Pittston and its efforts to legislatively avert immediate and irreparable harm to hundreds of thousands of retired coal miners and their families, other coal operators had been working to devise a new scheme to avoid the application of the 1988 contractual work preservation provisions. During the term of the 1988 NBCWA, the Union witnessed new non-union mines being opened not by signatory companies, who would be subject to the three-out-of-five job offer program, but by their parent companies or related subsidiary companies. Coal reserves and properties that had been held directly by signatory companies were shifted to newly-created land-holding companies, and then transferred to newly-created corporate entities for development of new mines.

Even with all of the repeated collective bargaining remedies spanning two decades, coal operators continued their attempts to avoid their contractual obligations through various corporate manipulations. Each time the Union thought it had negotiated a provision that would hold the coal companies to their promises, these companies sought new loopholes to exploit.[6] Consequently, when the 1988 NBCWA

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[6]*See e.g., UMWA v. Cyprus Amax Coal Co.*, Civ. No. 97-Z-34 (D. Colo. filed April 22, 1996). In *Cyprus Amax*, the coal operator tried to avoid its bargained-for obligation to secure the purchaser's agreement to assume successorship obligations under the NBCWA by conveying a closed mining facility to a non-union affiliate through a series of intra-corporate transfers.



expired in 1993, the Union's top priority was to address the corporate restructuring that had allowed signatory companies to evade their job preservation promises under the previous NBCWAs.

Negotiations on this issue proved difficult and the UMWA eventually called a selective strike against various companies that lasted for over seven months. Again, Secretary Usery was called upon to assist the parties in reaching agreement. Negotiations finally concluded with the coal operators' agreement that, as limited agents of their parent companies, they would agree that signatories' parent companies would provide the same three-out-of-five job offer program at the non-signatory mines of their other subsidiaries and related companies through a new agreement, the Memorandum of Understanding Regarding Job Opportunities ("Jobs MOU").

While the language of this new provision, combined with the original language governing the three-out-of-five jobs program has operated to provide some miners with work, albeit not under a UMWA contract, disputes still exist,

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The facility was reopened, and the companies took the position that because it had been closed for a period of time before reopening, the facility was not an "operation" under the terms of the NBCWA's successorship clause, inasmuch as it was not actively producing coal at the time of the transfer. On August 28, 2000, a jury found in favor of the Union on the issue of liability, concluding that the facility was subject to Article I of the NBCWA and that the companies had breached this provision. The case is presently pending before the Magistrate Judge for a determination of damages and final judgment.

indicating that despite their promises and the clear intent of these provisions, some companies will engage in transactions to create business structures that, arguably comply with the letter of the agreement, but are structured with the intent of avoiding job promises under the contract. Numerous cases have been heard by the Jobs Monitor[7] regarding attempts by companies to subordinate function to formality to avoid their promises to hire laid off bargaining unit employees. *See KenAmerican Resources, Inc. v. UMWA*, 99 F.3d 1161 (D.C. Cir. 1996)(challenging arbitrator's award in favor of UMWA)

These disputes continue to this day and the UMWA has spent significant resources chasing down companies to hold them to their contractual obligations. *See e.g., UMWA v. Apogee Coal Co.*, Civil Action No. 99-574 (E.D. Ky.) (suit pending against three related corporate defendants for their failure to secure employment and other contractual rights of bargaining unit members when they conveyed mines to a third party in violation of the successorship clause of 1998 NBCWA).

Even under the Coal Act, employers have continued their historical practice of evading responsibility for contractually promised, and now legislatively mandated, health care to their former employees. Literally dozens of lawsuits have been filed by coal employers challenging the Coal Act on any number of grounds and nearly an equal number of suits have been filed by the statutorily-created funds to enforce the provisions of the Act against obligated

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[7]The Jobs Monitor is the designated national arbitrator of disputes that arise under the work preservation clauses of the NBCWAs.



employers. *See e.g., Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999)(challenging constitutionality of Coal Act); *Penn Allegh Coal Co. v. Holland*, 183 F.3d 860 (D.C. Cir. 1999) (challenging liability for disability pensioners); *Pennsylvania Mines Corp. v. Holland*, 197 F.3d 114 (3d Cir. 1999)(same); *Dixie Fuel Co. v. Apfel*, 171 F.3d 1052 (6th Cir. 1999) (challenging validity of late assignments); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998)(constitutionality); *Davon Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996)(same); *In re Blue Diamond Coal, Co. (Blue Diamond Coal Co. v. Shalala)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997)(same); *Holland v. Keenan Trucking Co.*, 102 F.3d 786 (4th Cir. 1996); *In re Chateaugay Corp. (LTV Steel Co. v. Shalala)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995)(same); *Pittston Coal Group, Inc. v. UMWA*, 894 F. Supp. 275 (W.D. Va. 1995)(coal companies sued UMWA alleging union breached collective bargaining agreement by lobbying for and causing Congress to enact Coal Act); *Shenango, Inc. v. Apfel, decision pending* 00-2525 (3rd Cir. 2000)(challenging related persons provision and validity of late assignments).

## SUMMARY OF THE ARGUMENT

The Fourth Circuit erred in concluding that the Commissioner of Social Security does not have the authority to assign beneficiaries to "successors" to signatory operators. The Coal Act clearly expresses Congress' intent to extend the reach of the Act to successors of signatory operators. An examination of the statute's language, read in light of its broad purpose and expansive scheme of liability, supports such a conclusion. In addition, the assignments to

Respondents are consistent with the Coal Act's stated purpose and its broad remedial goal, which intentionally seeks to spread Combined Fund liability among a wide range of companies, including successors. The court of appeals' restrictive reading of the Coal Act cannot be adopted without causing fundamental damage to the statute - leaving a gaping hole in the Coal Act and producing an absurd result that could not logically have been the intent of Congress.

## ARGUMENT

Although the Coal Act expressly provides that a "successor in interest" to a "related person" may be responsible for Coal Act beneficiaries, it does not expressly state that a "successor in interest" to a "signatory operator" is so responsible. Nonetheless, the Commissioner of SSA has reasonably determined that a "successor" is another type of "related person" and is to be treated as such for purposes of making assignments under the Act.

Such a determination is consistent with Congress' decision to close "loopholes" to prevent employers from evading their obligations under the statute. Indeed, the very impetus for the Coal Act was to stop coal operators from escaping their contractual health care responsibilities by creating new corporate forms. To implement this decision, Congress provided that the obligations imposed under the Coal Act will extend to "related persons" and "successors in interest" of such employer. *See* Sections 9701 (c)(2), 9704(a), 9711(c), 9712 (d)(4).

Additionally, as reflected in the legislative history of the Act, Congress recognized that the coal industry was rife with frequently shifting corporate structures and it did not



want to allow responsible operators to be able to shift their liabilities to others. Indeed, as expressed by Senator Wallop, "because of complex corporate structures which are often found in the coal industry, the number of entities made jointly and severally liable for a signatory operator's obligations under the definition of related persons is intentionally very broad." 138 Cong. Rec. 34,002 (1992). Senator Wallop also stated that "related persons" includes "in specific instances successors to the collective bargaining agreement obligations of a signatory operator." *Id.* Finally, Senator Rockefeller remarked that the term "signatory operator" includes "a successor in interest of such operator." *Id.* at 34,033.[8]

Clearly, the failure to permit assignments to the direct successor of a signatory operator would frustrate the intent of Congress to stabilize the financing of the UMWA health care system and to place responsibility for that financing on the persons most responsible for the liabilities. It is difficult to imagine that, outside of the signatory operators themselves, there exist entities who are *more* responsible for these liabilities than successors to the signatory operators. This is

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[8] *See also* Dissenting Opinion of Judge Murnaghan in *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 311, n. 4 (4th Cir. 2000):

> Some might suggest that coal companies are unlikely to attempt to profit from such a 'loophole' in the Coal Act, however, this suggestion ignores the fact that coal companies have a long history of using the tools of successorship to maximize shareholder profits at the expense of workers and retirees.

particularly true in light of the fact that Congress went to great lengths to ensure that "related persons" to such operators are jointly and severally liable under the Act. As explained by the D.C. Circuit:

> In light of [the purpose of the Coal Act] and the broad reach of the provisions imposing liability on related persons, we can think of no reason why Congress would have intended to impose liability for the beneficiaries on, for example, a successor in interest to a Coca-Cola bottling company under common control with a signatory coal mine operator while exempting a coal-mining successor in interest to that operator.

*R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 895 (D.C. Cir. 1999).

Adoption of the Fourth Circuit's determination at issue here would significantly undermine the Congressional decision to support coal industry retirees and hold employers statutorily liable for honoring their promises of health care where the collective bargaining agreements had failed to do so. Coal companies under continuing economic pressures will be encouraged to sell their assets to a successor in order to avoid their obligations resulting in the "same dwindling funding base that Congress intended to rectify by passing the Act." *Sigmon*, 226 F.3d at 311 (Murnaghan, J., dissenting). As fittingly stated by the late Judge Murnaghan, Congress could not have "intended to cure the crisis in the coal industry by infecting it with part of the disease." *Id.*



## CONCLUSION

For the foregoing reasons, the Court should reject the ruling below.

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IN THE

# Supreme Court of the United States

LARRY G. MASSANARI,
ACTING COMMISSIONER OF SOCIAL SECURITY,
*Petitioner,*

v.

SIGMON COAL COMPANY, INC. ET AL.,
*Respondents.*

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**On Writ of Certiorari**
**To the United States Court of Appeals**
**For the Fourth Circuit**

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## BRIEF *AMICUS CURIAE* OF BELLAIRE CORPORATION, IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the Combined Fund provisions of the Coal Act should be construed to impose retroactive liability upon successors in interest to signatory operators, even though the statute's unambiguous language does not so provide.

2. Whether statutory language that is entirely unambiguous, both on its face and when viewed in context with other portions of the same statute, and which if applied as written it would withstand a constitutional challenge under rational basis scrutiny, may be interpreted and applied in a manner contrary to its meaning.

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## STATEMENT OF INTEREST[1]

Bellaire Corporation formerly mined coal under National Bituminous Coal Wage Agreements ("NBCWAs") signed with the United Mine Workers of America ("UMWA") and has been charged with liability for retiree health benefits under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 ("Coal Act"). Bellaire last signed an NBCWA in 1984 and stopped mining bituminous coal at about the same time. Based upon its own mining operations, Bellaire has been assigned responsibility under the Coal Act's United Mine Workers of America Combined Benefit Fund ("Combined Fund") for retiree health benefits for several hundred retired miners (and their dependents) whom it actually employed for some period of time.

In addition to Combined Fund liabilities arising from Bellaire's own coal mining operations, the Commissioner of the Social Security Administration assigned to Bellaire responsibility for a total of eighty-nine beneficiaries, consisting of retirees and their dependents, of two coal mining companies whose assets were acquired by Bellaire decades before Congress passed the Coal Act. All of the assigned retirees left their employment with the sellers before Bellaire purchased those companies' assets; none ever worked for Bellaire. Bellaire acquired the assets of Cambria Mining Company ("Cambria") in 1954 and acquired the assets of Independent Coal & Coke Company ("ICC") in 1968. Cambria was a signatory to the 1954 and earlier NBCWAs. ICC was a signatory to the 1966 and earlier NBCWAs.

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[1] Counsel for all parties have consented to the filing of this *amicus* brief, and *amicus* have filed those consents with the Clerk of Court. Sup. Ct. R. 37.3. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to this brief's preparation or submission. Sup. Ct. R. 37.6.

Neither Cambria nor ICC continued to operate under its own name or signed another NBCWA after its assets were sold. If either company existed today, its signatory operator liability to the Combined Fund would be unconstitutional under *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

The Commissioner recognizes that either Cambria or ICC was the actual "signatory operator" and "last signatory operator" as defined in sections 9701(c)(1) and 9701(c)(4) of the Coal Act with respect to each retiree and dependent at issue. According to the Commissioner, Cambria or ICC also would have been the "assigned operator" under section 9701(c)(5) of the Coal Act for purposes of Combined Fund premiums with respect to each retiree (and his or her dependents) if Cambria or ICC had remained in business on July 20, 1992. But neither Cambria, ICC, nor any "related person" to either of them, as defined by the statute, remained in business on that date. Instead of relying on the Act's provisions for the assignment of the miners, the Commissioner concluded that Bellaire, as the successor in interest to a signatory operator, was a "related person" despite the fact that it did not meet the statutory definition of a "related person." § 9701(c)(2)(A). "Related persons" are jointly and severally liable, along with the last signatory operator. §§ 9704(a), 9706(a).

Accordingly, Bellaire has a direct interest in the outcome of this case. Its liability to pay premiums to the Combined Fund to finance lifetime health care benefits for eighty-nine miners and their dependents turns upon whether Congress in fact imposed liability to the Combined Fund retroactively upon pre-Coal Act successors in interest of signatory operators.[2]

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[2] In fact, Bellaire was litigating this very issue in the United States District Court for the Southern District of Ohio when certiorari was granted in *Sigmon*, whereupon the district court stayed and administratively closed the case, subject to reopening after this Court decides *Sigmon*. *Bellaire Corp., et al. v. Apfel, et al.*, No. C-2-99-532 (S.D. Ohio Apr. 25, 2001).



More generally, as a corporate citizen that does its best to adhere to the law as it understands it, and which experiences substantial inefficiencies and unexpected costs when statutory requirements with which it must comply are either uncertain or are ultimately given an interpretation contrary to their unambiguous meaning, Bellaire has a direct interest in the interpretation of statutes in a manner that is consistent with the words used.

## ARGUMENT

This case presents the question whether the plain language of section 9701(c)(2) of the Coal Act should be applied as written.[3] Under this Court's decisions, the resulting pattern of liabilities based on an unambiguous literal reading cannot be disturbed by a court unless it is so absurd or inconsistent with Congress's demonstrable intentions that one can say with assurance that a different meaning was intended.

The Fourth Circuit in this case, over a dissent, noted that the statutory definition of "related persons" in section 9701(c)(2)(A) itemizes three categories of entities defined by particular relationships to a signatory operator, and goes on to include "successor[s] in interest" to the entities thus defined. Pet. App. 24a. Because this language clearly does not extend to successors in interest of signatory operators themselves, and because the court found that the literal language was not "contrary to clearly expressed congressional intent," it upheld the district court's ruling against the Commissioner. Pet. App. 28a.

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[3] There is no issue in this case about whether any retired miners or their dependents will receive health care benefits. The Act assures coverage for those individuals whether or not the Commissioner assigns to entities such as Respondents or *amicus* Bellaire liability to the Combined Fund.

In *R.G. Johnson Co. v. Apfel*, 172 F.3d 890 (D.C. Cir. 1999), the District of Columbia Circuit Court of Appeals, by a 2-1 vote, reached the opposite conclusion. While conceding that the literal language of the statute excludes successors in interest to signatory operators from the definition of related persons, the court concluded "that because such an interpretation would frustrate the clear intent of Congress . . . 'related person' must be construed to include a successor in interest to a signatory operator." *Id.* at 891-92. It reached this conclusion in light of Congress's stated intention, in a note to the Act's first section, to impose financial responsibility on "persons most responsible for plan liabilities," and the court's inability to think of any "reason why Congress would have intended to impose liability" on a successor in interest to a related person, but not on a successor in interest to the signatory operator. *Id.* at 895.

The Third Circuit Court of Appeals followed the reasoning of *R.G. Johnson* and held that the literal application of section 9701(c) of the Coal Act produced "'a result [that was] demonstrably at odds with the intentions of the drafters.'" *Aloe Energy v. Apfel*, No. 99-3915, slip op. at 8 (3d Cir. 2000) (quoting *R.G. Johnson*, F.3d 890 (D.C. Cir. 1999).

## I. The Statutory Language At Issue Is Entirely Unambiguous In Imposing No Retroactive Liability On Pre-Act Successors In Interest Of Signatory Operators

All of the judges who have labored on these cases, including those judges who ultimately declined to follow the literal language, agree that the words of the statute are unambiguous in extending the status of "related person" to successors in interest of anyone otherwise fitting the description of "related person," and in not extending that status to successors in interest of parties defined as "signatory



operators."[4] A fuller consideration of the Coal Act's relevant provisions confirms this judgment, as well as the further conclusion that the statute affords no other basis on which to impose retroactive liability on pre-Act successors in interest of signatory operators.

The Coal Act addresses separate obligations for retiree health care benefits arising in connection with two separate funds—the Combined Fund, 26 U.S.C. §§ 9701-9708, and the 1992 UMWA Benefit Fund, 26 U.S.C. § 9712—as well as in connection with Individual Employer Plans, 26 U.S.C. § 9711. Only the provisions concerning the Combined Fund are at issue in this case.[5]

Those provisions place primary liability on a signatory operator, who becomes the "assigned operator" under section 9704(a), for whom the retiree worked in the past. 26 U.S.C. § 9706(a). The Act also provides that where a person becomes

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[4] *See* Pet. App. 26a (text is "clear and unambiguous"); Pet. App. 39a ("literal reading . . . unambiguously excludes successors in interest to signatory operators") (Murnaghan, J., dissenting); *R.G. Johnson*, 172 F.3d at 891 ("we cannot fault the district court's literal reading of the definition"); *id.* at 896 (the definition "excludes successors in interest to signatory operators") (Randolph, J., dissenting); *Aloe Energy, slip op.* at 7-8 (relying entirely on *R.G. Johnson*, and quoting its conclusion that the "literal application of [the] statute will produce a result demonstrably at odds with the intentions of the drafters.")

[5] The Combined Fund, established by the 1992 Coal Act, covers miners who retired prior to July 20, 1992. 26 U.S.C. § 9703(f). Retired miners whose benefits are provided by Individual Employer Plans, which were required to be created under 1978 and later wage agreements, are covered by section 9711. The 1992 Benefit Plan is established by section 9712 and covers those miners who retired between July 20, 1992 and September 30, 1994.

a successor of an assigned operator after enactment of the Act, the assigned operator may—*but need not*—transfer liability for Combined Fund beneficiaries to that successor. § 9706(b)(2). When that occurs, the assigned operator remains liable as a guarantor of the benefits. *Id.* The statute contains no provisions of any sort addressing the liability to the Combined Fund of entities which became successors in interest to signatory operators before the enactment of the Act. As a result, the statute unmistakably provides that prospective liability of successors to signatory operators—that is, resulting from transfers occurring after enactment of the Act—is optional, and may result from a voluntary agreement of the parties to the transaction. At the same time, the Act fails to impose any retroactive liability upon successors or successors in interest to such operators based on pre-Act transfers.

The provisions further state that any related person of an assigned operator shall be jointly and severally liable for any premium owed by the operator. § 9704(a). Related persons, in turn, are explicitly defined to include three categories of entities related to a signatory operator in specified ways, including where they are under common or shared control. § 9701(c)(2)(A)(i-iii). The Act also provides that successors in interest of related persons so defined shall themselves be related persons.[6] *Id.* The status of related persons based on

[6] Bellaire notes that the Commissioner made each of the assignments of Cambria and ICC retirees to Bellaire on the basis that it is a "successor" to those entities, not a "successor in interest." The Commissioner apparently ignored the fact that Congress employed the two terms in different provisions of the Coal Act in such a way that they clearly have separate and distinct meanings. *See Holland v. New Era Coal Co.*, 179 F.3d 397, 402 (6th Cir. 1999). The court in *Holland* relied on Treasury Regulation § 1.1503-2(c)(12) and found that "successor in interest" requires a substantial transfer of assets or stock so that the acquiring corporation succeeds to the tax attributes of the acquired corporation. "Successor" is a general term, encompassing a broader set of transactions and resulting entities. Because only "successors in interest" are liable



the relationships defined in section 9701(c)(2)(A)(i-iii) is to be determined as of July 20, 1992, 106 days prior to enactment on October 24, 1992, unless the signatory operator is then no longer in business. In that event the determination is to be made as of the time just before the operator ceased to be in business. § 9701(c)(2)(B).

As a result of these related person provisions, the statute is explicit that a successor in interest of an entity meeting the definition of related person on July 20, 1992 is itself also a related person. § 9701(c)(2)(A). Thus, post-Act successors in interest of related persons have liability under the Act. At the same time, retroactive liability of successors in interest to related persons can arise in only limited circumstances. First, because the Act states that related person status is generally to be determined as of July 20, 1992, entities that become successors in interest to related persons (as determined on July 20, 1992) prior to the date of enactment (October 29, 1992), are in fact related persons themselves. Second, the same section also provides that if a signatory operator is no longer in business on July 20, 1992, related person status is to be determined at the time just before that operator ceased to exist. In that case, those who became successors in interest to related persons after the date the signatory operator went out of existence are also "related persons" under the Act, even if the succession occurred prior to the Act. Other than these two instances, the Act imposes no retroactive liability on successors in interest to related persons, because there can be

under section 9701(c)(2)(A), Bellaire assumes that the Commissioner used "successor" imprecisely when he meant "successor in interest." Whichever term is used, as explained below, Bellaire is a successor in interest to a signatory operator, not a related person, and the Act excludes it from liability.

no successor in interest to a related person before the related persons are identified.[7]

The Government claims that the language of the Act is actually ambiguous and that various extrinsic indications of legislative intent mandate retroactive liability for Respondents. It argues that the definition of "related person" includes successors in interest to signatory operators because each of the three statutory categories of related persons is defined in terms of entities related in certain ways to a signatory operator. U.S. Br. at 24. This argument does not, however, succeed in creating ambiguity sufficient to justify a search for meaning outside the text of the statute. As the Fourth Circuit pointed out, the suggested interpretation necessitates accepting the conclusion that a signatory operator is a related person to itself, a proposition that is difficult to grasp, let alone to accept as true. Pet. App. 25a, (citing *R.G. Johnson*, 172 F.3d at 894).

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[7] Even the Commissioner agrees that Congress intended that, in cases of pre-Coal Act succession where the seller or a related person remains in business for purposes of the Coal Act, liability to the Combined Fund should rest with the seller signatory operator or its related persons, and not with any successor in interest, thus avoiding retroactive imposition of liability on successors in interest in that circumstance. In *Eastern Enterprises v. Chater*, 110 F.3d 150, 154 (1st Cir. 1997), *rev'd on other grounds sub nom., Apfel v. Eastern Enterprises*, 524 U.S. 498 (1998), the Commissioner successfully resisted the argument of a pre-Act seller of coal assets that the successor company, rather than the original signatory operator, should bear the Coal Act liability. In upholding the Commissioner's position, the First Circuit noted the Act's express provisions assigning responsibility to the signatory operator, and rejected the argument that "Congress overlooked the possibility of assignment to successors" in interest of such an operator. The court reasoned that Congress is generally presumed to act "intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section of the same Act." 110 F.3d at 155 (quoting *Brown v. Gardner*, 513 U.S. 115, 120 (1994)).



Nor is any ambiguity concerning the meaning of the statute created by the argument offered by the Combined Fund, Br. at 22, that the statutory definition of "signatory operator" should itself be read to encompass successors in interest to signatory operators. This assertion is made by reference to general definitions of "person" and "company" which appear in sections one and five of Title 1 of the U.S. Code, and by linking those two definitions together in a manner that is fallacious on a number of grounds. Most obviously, these generic provisions of Title 1 are inapplicable because the Coal Act specifically addresses the liability of successors to a signatory operator with assigned liability to the Combined Fund under the Act, 26 U.S.C. § 9706(b)(2). That section provides that, following enactment of the Act, liability may or may not, by agreement, be transferred to the successor. The Coal Act thus expressly contradicts the assertion that responsibility to the Combined Fund is passed automatically from a signatory operator to its successor or successor in interest based on general definitions in Title 1.

Despite the lack of ambiguity, the Government argues for expanding the statutory definition of related person beyond that found in the statute based on broad notions of the purpose of the Coal Act. The question thus presented is whether the Coal Act should be construed to impose retroactive liability on successors in interest to signatory operators, even though its unambiguous language does not do so.

## II. This Court's Cases Dictate That Unambiguous Statutory Language Must Be Applied As Written Unless The Result Would Be Absurd Or Demonstrably At Odds With The Intentions Of The Drafters

It is clear from this Court's decisions that where statutory language is unambiguous, it should be applied in accordance with its terms except in rare circumstances. What is less clear is the precise nature of the unusual circumstances that justify

a court's amendment of the particular words selected by Congress.

Most commonly, this Court has stated the rule that the plain and unambiguous language of a statute must be followed unless the literal construction is "so absurd or illogical that Congress could not have intended it." *E.g., Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993). This Court has articulated the level of absurdity required to justify departure from the letter of the law as that which is "so gross as to shock the general moral or common sense," *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930), or which leads to "wholly impracticable consequences." *Caminetti v. United States*, 242 U.S. 470, 490 (1917).

As nearly categorical as this language at first sounds, it in fact fails to define the range of considerations by which the absurdity or illogic of the textual result is to be assessed. A court might find a statute to be absurd or illogical because, when its separate provisions are viewed together, they are seen to be incongruous or inconsistent with each other. Alternatively, if a court is permitted to look beyond the statute itself, absurdity, illogic, or incongruity may be found where the statutory language in question is fully consistent with other provisions of the statute, on the ground that it is contrary to some notion of the statute's intent drawn from considerations extrinsic to the statute itself. Legislative history, in any number of forms, could lead a court to this conclusion. What requires clarification is when, if ever, in assessing absurdity that may justify negating the clear meaning of a statute's words, a court may consider these extrinsic factors beyond the language of the statute itself.

A second test regularly articulated by this Court for determining whether to depart from the unambiguous literal language of a statute requires the determination of whether "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."



*United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 571 (1982)). Where that is true, this Court has stated "those intentions must be controlling" over the statute's literal words. *Griffin*, 458 U.S. at 571. Once again, while this language also clearly contemplates that the literal language will govern except in "rare cases," *Ron Pair*, 489 U.S. at 242, the test is indeterminate in failing to define the sources to be relied upon in divining the "intentions of [the] drafters." If such intentions must be drawn from the language of the statute itself—perhaps from other sections, with which the language at issue is in conflict—then the literal language must govern except where other portions of the same enactment render the statute, as thus read, irrational or inconsistent. If, alternatively, the "intentions of [the] drafters" may be discerned from materials outside of the statute itself, then the way is open for a statute's unambiguous words to be trumped by legislative reports and by extrinsic arguments of sponsors and others.

In one case, this Court injected additional uncertainty into this inquiry by suggesting that a court should look beyond the plain meaning of an unambiguous statute where the result "seems inconsistent" with the intent of Congress. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 455 (1989). This directive suffers not only from the uncertainty discussed above, but also from a lack of clarity as to the degree or character of the perceived inconsistency. That same decision goes on to suggest that, perhaps, no actual inconsistency is required at all, by stating that a court is justified in looking beyond the literal text "when the result it apparently decrees is difficult to fathom." *Id.* The level of subjectivity imported by this standard into the process of reading statutes is substantial. Some courts may have an easier time "fathoming" certain results than other courts, and how much "difficulty" is enough to justify departing from the statutory language is left undefined.

Even more severe problems inhere in other articulations by this Court. In *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), the Court found it proper to rely on the "spirit" of a statute rather than the plain meaning of its text, where "the whole legislation or . . . the circumstances surrounding its enactment . . . makes it unreasonable to believe that the legislator intended" it to be read in accordance with its literal language. This language, which has been much discussed during the intervening century,[8] leaves open-ended not only the range of considerations properly to be considered in determining whether the literal language should be ignored, but also the breadth of resources to be referenced to identify the statute's "spirit" from which its meaning may be derived.

Accordingly, as more fully discussed below, there is a need for clarification of the circumstances under a court may override unambiguous statutory language.

## III. The Principle Of Separation Of Powers Demands That Unambiguous Statutory Language Should Be Given Effect In Accordance With Its Terms, Unless So Read It Is Invalid Under Rational Basis Scrutiny

*Amicus* Bellaire submits that the ambiguity inherent in the standards articulated in this Court's opinions raises serious

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[8] *See* Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter and History in Statutory Interpretation*, 100 Colum. L. Rev. 901 (2000) (collecting discussion of the case in Supreme Court decisions, articles by members of the Court and at oral argument); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 Stan. L. Rev. 1833 (1998) (asserting that the Court's selective reading of legislative history in *Holy Trinity* led it to an incorrect conclusion about Congress' intent in passing the law at issue).

Justice Kennedy's concurrence in *Public Citizen* criticizes *Holy Trinity*'s "unhappy genesis" and "unwelcome potential," in allowing "judges to substitute their personal predelictions for the will of the Congress." *Public Citizen*, 491 U.S. at 473-74 (Kennedy, J., concurring).



problems of separation of powers in cases like the present one, where legislation enacted by Congress is entirely unambiguous on its face.

> While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

*Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). As Justice Kennedy noted, concurring in *Public Citizen*, the absurdity exception to the application of a statute's plain meaning "remains a legitimate tool of the Judiciary . . . only so long as the Court acts with self-discipline by limiting the exception to situations where . . . it is quite impossible that Congress could have intended the result." 491 U.S. at 470-71. Otherwise, it amounts to an encroachment on one of the "central prerogatives" of the legislature—to enact legislation. *See Loving v. United States*, 517 U.S. 748, 757 (1996).

Without question, the case before the Court, in which legislative language can be said to be utterly clear and unambiguous on its face, is not the most common situation. In the more usual case, where the literal meaning is debatable, various principles of statutory interpretation are applied in order to discern the meaning of the language used. In the case of ambiguous statutory language, there is room for disagreement about the reliance properly to be placed on various forms of legislative history, and even concerning the propriety of considering factors separate and apart from both

the legislation itself and its circumstances of enactment.[9] There, because there is doubt about the meaning of the words enacted, at least it cannot be said that the court is simply invalidating the language chosen by Congress and substituting its own.

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[9] This Court has relied on all of the following sources in determining the meaning of legislation: committee reports; sponsor statements; rejected proposals; floor and hearing colloquy; nonlegislative drafters and sponsors; and legislative silence and subsequent history. *See* William N. Eskridge, *The New Textualism*, 37 UCLA L. Rev. 621, 636-40 (1990). *Compare Garcia v. United States*, 469 U.S. 70, 76 (1984) (the "authoritative source" of Congressional intent is found in the Committee Reports on the bill; eschewing reliance on statements of individual members); *with Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (statements by individual legislators provide evidence of Congress' intent when they are consistent with the statutory language and other legislative history) (citation omitted); *and Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 744-45 n.11 (1989) (relying on report of the "Joint Committee of the American Book Publishers Council and the American Textbook Publishers Institute" in construing the Copyright Act); *with American Trucking Ass'n Inc. v. Atchison, Topeka and Santa Fe Ry.*, 387 U.S. 397, 417-18 (1967) (refusing to consider administrative agency advocacy in support of legislation as part of legislative history).

The Court has held both that reliance on subsequent legislative history is "dangerous" and that it is "entitled to great weight." *Compare, Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 170 (2000) ("subsequent history is less illuminating than the contemporaneous evidence") (internal citation omitted); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one") (internal citation omitted); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994) ("the views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight . . . and the views of the committee of one House of another Congress are of even less weight") *with Loving v. United States*, 517 U.S. at 770 ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction") (internal citation omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969).



Such judicial legislation is precisely what occurs when a statute's meaning is free from doubt, but a court nevertheless declines to apply it as written, instead assigning to it a different meaning because the court perceives that extrinsic considerations suggest a contrary intent. Separation of powers is offended not once but twice in such cases—first, by failing to enforce the enactment as indisputably written, and again, by giving force to an enactment that the legislature never adopted.

To avoid this result, *amicus* Bellaire urges the Court to adopt a rule of construction applicable only in a case such as this one, where the meaning of the literal language is unmistakable. Because the failure to follow such language amounts to not only its invalidation, but also to the substitution of an alternative enactment, Bellaire suggests that the unambiguous literal language should be followed, except in those circumstances where enforcement of the words as written would be unconstitutional.

This approach makes directly relevant this Court's numerous decisions in cases where statutory classifications are challenged on the basis that they offend the Equal Protection or Due Process Clauses. Under those cases, statutory language is enforced as written, and the constitutional challenge is rejected, regardless of Congress' actual intent, if there is any *conceivable* basis on which it can be said to be rational.

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). *Accord McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."). It is enough that the Court "be able to perceive a basis upon which the Congress might resolve the conflict as

it did." *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). *Accord Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (requiring only some "plausible" policy reason to support a statutory categorization).

Likewise, where legislation is challenged under the Due Process Clause, a court's authority does not reach the question "whether the Congressional judgment expressed . . . is sound or equitable, or whether it comports well or ill with the purposes [of] the act. . . . [T]he Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611 (1960). This Court thus seeks explanations for legislative actions which meet only a minimal level of rationality. For example, in *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), the Court upheld a state law criminalizing certain conduct, stating that "we refuse to sit as a 'superlegislature to weigh the wisdom of legislation.'" (internal citation omitted).

A statute imposing obligations retroactively faces heightened scrutiny under a due process challenge because its obligations are based on conduct which occurred in the past, over which the party adversely affected has no continuing control. Because "retrospective laws are, indeed, generally unjust," 2 J. Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891), this Court has held that such enactments should be subjected to somewhat closer scrutiny. Such retroactive legislation, however, is sometimes upheld against constitutional challenges. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975), for example, the Court upheld the retrospective imposition of liability for black lung benefits upon former employers, on the ground that it was justified as a "rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Id.* at 18. "It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader



cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Id.* at 19. *Accord Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

These cases, and others like them, make clear that, absent strict scrutiny triggered by a suspect classification or fundamental interest, a statute may not be invalidated simply because it fails to implement the perceived intentions ascribed to the drafters in a tidy and estimable manner. The Court has further made clear that a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315. It is enough that a conceivable rationale is "arguable" to "immuniz[e]" the Congressional choice from constitutional challenge. *Id.* at 320.

No lesser standard should apply where the issue is not only the invalidation, but the rewriting of a statute's unambiguous words. Thus courts should do so only where the constitutional test is met and not on the basis that the clear words fail to neatly advance a supposed purpose derived from evidence extrinsic to the statute.

## IV. The Coal Act's Express Provisions Imposing No Retroactive Liability On Pre-Act Successors In Interest To Signatory Operators Should Be Applied As Written, Even Though The Act Allows Limited Retroactive Liability Of Successors In Interest Of Related Persons

The Coal Act is a highly complex and intricate set of provisions which, as the Court's opinion in *Eastern Enterprises v. Apfel* details, was the product of a long history of labor unrest in a declining industry, combined with a legislative determination to identify funding sources to secure lifetime health benefits to miners whose former employers

were not obligated or not able to provide them. 524 U.S. 498, 504-514 (1998). It accomplishes this objective by placing on the shoulders of selected current and former coal operators and their related persons responsibility for the future health benefits of retired mine workers and their dependents. In most instances, the retired miners worked for the entity charged with financial responsibility for some period of time. In *Eastern Enterprises*, the Court recognized that the Act, viewed as a whole, is fundamentally retroactive in character. *Id.* at 534. Ultimately, for that and other reasons, the Court found an absence of rationality within the Act to be so profound, as it relates to the "third tier" of liability, as to invalidate that provision on constitutional grounds. *Id.* at 537-38 (opinion of Justice O'Connor) (the Act "singles out certain employers to bear a burden that is substantial in amount, based on . . . conduct far in the past, and unrelated to any commitment that the employers made."); *Id.* at 548-49 (Kennedy, J., concurring) (noting the capacity of retroactive laws to "change the legal consequences of transactions long closed . . . thus destroy[ing] the reasonable certainty and security which are the very objects of property ownership").

This case presents no question whatsoever relating to prospective liability arising from successorship—that is, from assuming the status of a successor after the enactment of the Act. The statutory responsibility of such entities is clear and is not disputed here.[10] At issue in this case is only whether

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[10] The Act unambiguously provides, as to "a person becom[ing] a successor of an assigned operator after the enactment date," that it may, but need not, contractually undertake primary responsibility for liabilities under the Act. If it does so, the original signatory operator will remain liable as a guarantor. § 9706(b)(2). The "related persons" provision applies only to acts of succession after July 20, 1992 and states that all such successors in interest are themselves related parties. § 9701(c)(2).

Whatever the reason for this distinction in the imposition of prospective liability of successors in interest to signatory operators and related persons,



retroactive liability should be imposed upon entities, like Respondents and *amicus* Bellaire, who became successors in interest to signatory operators prior to adoption of the Act.

*Eastern's* invalidation of the Act's most remote imposition of retroactive liability on a former employer makes emphatically clear that the Act's *failure* to impose such retroactive liability upon successors in interest to signatory operators would survive any constitutional challenge. Congress may well have considered such pre-Coal Act buyers from signatory operators to be too remote in terms of time and lack of any employment relationship to justify the imposition of liability. Whatever the reason, the disfavored character of retrospective liability makes it all but unthinkable for this Court to infer such retroactive liability out of thin air based on a concern for statutory symmetry.

The Government argues for recognition of just such implied retroactive liability, based in part on the Coal Commission Report and several statements put in the record by individual legislators. It contends that Congress meant to cast a broad net of liability over various corporate entities related to the signatory operator, and specifically that it intended to reach pre-Act successors in interest to the signatory operator. U.S. Br. at 26-28. Most emphatically, it argues, as the D.C. Circuit found and as the dissent below argued, that the literal language of the Act is at odds with:

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there can be no doubt that it would withstand constitutional challenge. A concern to facilitate the sale of coal companies, as suggested by the court below, Pet. App. 32a-33a, is one clearly rational explanation. But given the prospective character of the legislation, it is unlikely that any such explanation is even necessary. Congress "may take one step at a time," and "may select one phase of one field and apply a remedy there, neglecting others." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Congress need not select the most effective or efficient approach to any particular problem. A court's ability to discern a better alternative does not permit it to legislate in Congress' place.

> Congress's stated purposes of ensuring that each Combined Benefit Fund beneficiary's health-care costs is borne (if possible) by the person with the most direct responsibility for the beneficiary, and not by other signatory operators that had no connection with the beneficiary, or by the public fisc.

U.S. Br. at 28; 172 F.3d at 895; Pet. App.39a-40a

*Amicus* Bellaire submits that, for two reasons, this Court should reject the argument of the United States and its *amicus* that the statute's language must be modified to accord with their view of congressional intent as derived from evidence extrinsic to the statute.

First, this form of argument is fundamentally irrelevant in any discussion of constitutionality under rational basis review and should be irrelevant as well to the interpretation of language that is entirely clear and unambiguous on its face. The supposed intentions of the drafters, as reflected in floor statements, reports, or other advocacy, should have no bearing on whether unmistakable legislative intent, found in the plain language of the Act, should be given effect. Only where the statute makes no sense—because it is self-contradictory or because no set of facts or objectives can be conceived of under which it is rational—is a court justified in departing from the explicit provisions adopted by Congress.

Second, even if the statements of alleged intent are considered, neither they nor the supposed lack of symmetry in the statute as written is remotely adequate to justify reading into the statute a broad provision imposing retroactive liability on pre-Act successors in interest to signatory operators. The general statement of intent to reach those with the "most direct responsibility" for the retiree hardly supports imposition of liability on successors in interest who had no notice they were undertaking such responsibility. More generally, this Court has made clear that statutes imposing retroactive liability are



to be read narrowly and scrutinized carefully. Petitioner and its *amicus* cite no case where this Court has inferred the existence of such legislative intent to impose retroactive liability, based on extra-statutory statements of intent, or in the absence of statutory language compelling that conclusion. Certainly it should not do so here.

This conclusion is not altered by the fact that the Act provides for limited retroactive liability of successors in interest of related persons, though not those of signatory operators. Retroactive liability for successors in interest to related persons arises only where 1) the related persons transfer of ownership or assets occurs between July 20, 1992 (presumptive date for determining related person status) and October 24, 1992 (date of enactment), or 2) if the signatory operator was out of business before July 20, 1992, between that date and October 24, 1992. Indeed, this Court's decision in *Eastern Enterprises*, invalidating the Act's most remote retroactive imposition of liability upon a retiree's former employer, raises serious questions about the constitutionality of retroactive liability of successors in interest to related persons with whom the retired miner never had an employment relationship of any sort.[11]

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[11] Indeed, such pre-Act successors in interest of related persons are two steps removed from any employment relationship with the retiree, and had no basis on which to foresee that the acquisition might result in potentially mammoth liabilities. In *Eastern Enterprises v. Apfel*, this Court recognized that "[r]etroactivity is generally disfavored in the law." 524 U.S. at 532. The four members of the Court who concluded that the Commissioner's assignment of retired miners to Eastern Enterprises was an unconstitutional taking, found that "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised." *Id.* at 537. Considering the three factors relied upon to determine whether legislation amounts to a regulatory taking, the plurality found that the Act had substantial economic impact, it interfered with Eastern's reasonable investment-backed

But the validity *vel non* of the statute's retroactive provisions concerning successors in interest to related persons cannot alter the fact that it does not impose retroactive liability on successors in interest to signatory operators. And given this Court's strongly expressed reservations about retroactive legislation that imposes obligations based on conduct undertaken before the law was enacted, it would be ironic indeed if this Court, based on a perceived lack of legislative symmetry, were to read into the law a retroactive provision that Congress very clearly has not enacted.

It may be that legislators were motivated by a desire to cast the net of liability widely, and to thus expand available sources

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expectations and the nature of governmental action was unusual in that it singled out employers to bear a substantial burden based on past conduct that was unrelated to any commitment made or injury caused. *Id.* at 529-37. Justice Kennedy concurred in the plurality's conclusion that Congress exceeded its constitutional bounds when it imposed "liability for events which occurred 35 years ago" in the Coal Act. *Id.* at 549. Although relying on due process instead of takings theory, Justice Kennedy also focused on the Court's general distrust of retroactive legislation. "[D]ue process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." *Id.* at 549. Justice Kennedy agreed that application of the Coal Act to Eastern represented one of the rare cases where Congress overstepped its otherwise broad constitutional bounds in the area of economic legislation.

Such reasoning raises a serious question about the constitutionality of imposing retroactive liability on successors in interest to related persons. Assignment of any number of miners will have a significant economic impact on the successor. It will interfere with reasonable, investment backed expectations because at the time the successor in interest made its purchase the Act was not in existence and future liability was completely unknown. Finally, the government's conduct in such a case is exactly that which this Court found objectionable in *Eastern Enterprises*: imposition of retroactive liability on parties who took no action to incur or assume liability to pay for benefits—indeed, who had no antecedent employment relationship at all with the beneficiary. Nonetheless, whether or not such liability is constitutional against a takings or due process challenge is a question for another day.



of funds to those with some historical connection—albeit remote—to the original employer, as they adopted this broadly retroactive legislation. However, there can be no doubt that Congress refrained from imposing one additional layer of retroactive liability—upon those who became successors in interest to signatory operators prior to the Act. That act of prudence obviously must be given effect by the Commissioner[12] and this Court, regardless of the other forms

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[12] Petitioner argues that the Commissioner's assignment is entitled to deference under *Chevron* and thus must be upheld as a reasonable exercise of authority to administer the Act. U.S. Br. at 44-45, n.24. *Chevron* deference is improper for a number of reasons. First, *Chevron* applies only where an agency is resolving a particular statutory ambiguity. *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 845-46 (1984). Here, the statutory language is unambiguous. Second, even if ambiguity existed, courts apply *Chevron* deference only to agency decisions where the agency acts pursuant to delegated authority "to make rules carrying the force of law," as when it engages in adjudication or notice-and-comment rulemaking. *United States v. Mead*, 121 S. Ct. 2164, 2171 (2001).

Congress delegated neither legislative authority nor adjudicatory power to the Commissioner. Instead, the Coal Act imposes on the Commissioner the administrative tasks of identifying miners, signatory operators and related persons, and making assignments pursuant to Congress' specifications. Similarly, the Act's provisions allowing reconsideration of assignments, *see* § 9706(f), are insufficient to find that Congress granted authority to engage in adjudication. The Commissioner need only conduct a review of the assignment "if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error." § 9706(f)(2). This discretionary review is not equivalent to the rigorous procedures required for agency adjudication. The Commissioner's actions pursuant to the Act do not warrant *Chevron* deference.

Where *Chevron* deference is inapplicable, courts need only appreciate that agencies may possess "specialized experience" meriting deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). The Commissioner's assignments are not entitled to even this less deferential form of review because the assignment of retired miners to statutorily enumerated entities

of retroactive liability that the Act did, in fact, impose.

## CONCLUSION

The decision of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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requires no "specialized experience" or expertise. Moreover, the brief time period in which the Commissioner has been making assignments under section 9706 narrows the "body of experience" that might make deference to an agency's "informed judgment" appropriate. *Id.* at 140.

In sum, the Commissioner's decision to ignore the express language of the Coal Act excluding successors in interest to signatory operators from retroactive liability is not entitled to any form of deference.

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(9)

Supreme Court, U.S.
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No. 00-1307

# In the Supreme Court of the United States

LARRY G. MASSANARI,
ACTING COMMISSIONER OF SOCIAL SECURITY,
*Petitioner*,

v.

SIGMON COAL COMPANY, INC., and
JERICOL MINING, INC.,
*Respondents*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF OF *AMICI CURIAE* USX CORPORATION AND U.S. STEEL MINING COMPANY, LLC IN SUPPORT OF JERICOL

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## QUESTIONS PRESENTED

Whether the Court of Appeals for the Fourth Circuit correctly held that, given the plain language of the statute, a signatory operator's successors in interest are not related persons under Section 9701(c)(2)(A) of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §9701(c)(2)(A), and, therefore, cannot be assigned financial responsibility for a defunct signatory operator's retired miners whom they never employed?

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## STATEMENT OF INTEREST[1]

USX Corporation, by and through its wholly owned subsidiary, U.S. Steel Mining Company, LLC (herein collectively "USX"), is a major domestic coal producer and a "signatory operator" under the provisions of the Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. § 9701 *et seq.* (herein the "Coal Act"). Although USX is also the nation's largest steel producer, it was one of the largest domestic coal producers during the period after World War II. USX was one of the founders of the Bituminous Coal Operators' Association, a multiemployer group that, for over half a century negotiated the series of National Bituminous Coal Wage Agreements ("NBCWAs") that established various UMWA trust funds.

USX is representative of the large coal producing companies that have borne the burden of financing retiree medical benefits for their own retirees and the retirees of the entire coal industry. Prior to the enactment of the Coal Act, USX steadfastly met its obligations to fund retiree health benefits by contributing to the various UMWA trust funds and maintaining an Individual Employer Plan for its own post-1978 retirees. Since the enactment of the Coal Act, USX has been assigned financial responsibility for over 6,000 retired miners and their dependents and has always met its premium

[1] Each of the parties has consented to the filing of this brief. A copy of the letter of consent from each party has been filed with the Clerk of this Court in accordance with Rule 37.3. No persons other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief, and the brief was not authored in whole or in part by counsel for a party.

obligations to the Combined Fund (approximately $15.0 million per year).

This case presents the straightforward question of whether a signatory operator who buys the assets of a coal mine can be held liable under the Coal Act for a defunct seller's retired miners (and their dependents), even though the only connection between the buyer and the retired miners is that, at one time or another, the miners worked for the selling signatory operator at one of possibly several mines. The United States Court of Appeals for the Fourth Circuit found no basis for liability since the Coal Act plainly addresses "successor in interest" and "successor" liability in several instances, but yet contains no provision for assignment of responsibility to a signatory operator's "successors in interest," let alone assignment of responsibility to a signatory operator's "successors." This is an issue of considerable significance to the mining industry because, as the Combined Fund has itself observed, transactions of this type "occur on a routine basis in the coal industry." *See Brief of the Trustees of the UMWA Combined Benefit Fund as Amici Curiae In Support of Petitioner* (herein *"Combined Fund's Brief"*) at 14.

Like its fellow amicus, the UMWA Combined Benefit Fund (herein the "Combined Fund"), USX has a strong interest in having the base of contributing employers under the Coal Act remain as broad as is provided for by the statute. *Combined Fund's Brief* at 2. Indeed, under the Coal Act, coal producers like USX may bear financial responsibility for the payment of additional premiums for "orphan" miners who are not assigned to responsible operators. Unlike the Combined Fund, however, USX also has a strong interest in having the Coal Act enforced in accordance with its terms and having miners assigned only to operators for whom they



worked (or to persons related to such operators as provided specifically by the Coal Act). Indeed, given USX's extensive history of buying and selling coal mines, USX would have opposed the Coal Act if it had been written so as to impose liability on pre-enactment successors or successors in interest to signatory operators.

Like all large coal companies, USX has periodically both purchased and sold coal mines in the regular course of its business. These purchases and sales have been bona fide, arms length asset transactions with unrelated third parties. None of these sales were undertaken for the purpose of avoiding benefit liabilities, and the purchased mines were subsequently operated under the applicable NBCWAs. Indeed, USX's purchases and sales have involved many of the nation's large coal producers. *See generally Carbon Fuel Co. v. USX Corporation*, 891 F. Supp. 1186 (S.D. W. Va. 1995), *aff'd*, 100 F.3d 1124 (4th Cir. 1996).

In 1970, USX purchased a coal mine from Crystal Block Coal & Coke Company ("Crystal Block") and operated it in accordance with the terms of the 1968 NBCWA (and successor NBCWAs). In 1982, USX sold the mine to Old Ben Coal Company and, by agreement, Old Ben Coal Company assumed the NBCWA applicable to the mine. Old Ben Coal Company has continued to operate the mine ever since.

Notwithstanding the bona fide, straightforward transaction by which USX bought, and then sold, the assets of the former Crystal Block mine, the Commissioner of Social Security ("Commissioner") assigned several hundred retired miners (and their dependents) who had worked for Crystal Block (generally in mines other than the mine USX

purchased) to USX under the Coal Act.[2] Moreover, SSA made these assignments to USX despite the fact that there is not, nor has there ever been, any legal, corporate or organizational connection or relationship between USX and Crystal Block (other than the sale and purchase of the assets of a single coal mine); despite the fact that most of the retired miners worked for Crystal Block at one of its three other mines; despite the fact that Old Ben Coal Company continues to own and to operate the mine in question; and despite the fact there are other operators who actually employed these miners and logically should be considered more responsible for their health benefits than USX.[3]

USX believes the Court should be informed of the vast array of inequities that likely induced Congress not to make pre-enactment successors or successors in interest to signatory operators related persons. These inequities are vividly illustrated by the Commissioner's assignments to USX of all of the retired miners who had worked for an unrelated signatory operator that sold USX one of its four mines, which mine USX later sold to another operator who still owns it.

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[2] USX has challenged the validity of the Crystal Block assignments (as well as other assignments) in federal litigation captioned *USX Corporation and U.S. Steel Mining Company, LLC v. Massanari*, Civil Action No. 99-1058 (W.D. Pa.).

[3] In addition, it is worth noting that these miners (and their dependents) could not have been assigned directly to Crystal Block under this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 120 (2000), inasmuch as Crystal Block is a "super reach back company" that never signed the 1974 NBCWA or any successor agreement thereto.



## STATEMENT OF THE CASE

This case involves the Commissioner's efforts to apply the Coal Act so as to (1) permit the assignment of a defunct signatory operator's retired miners to the operator's successors in interest, and (2) equate the statutory term "successors in interest" with the term "successors," even though the former term is narrowly defined under the Internal Revenue Code (of which the Coal Act is a part) and the latter term is broadly defined through the federal labor law. Specifically, this case presents the question of whether Jericol Mining Company ("Jericol") (and ultimately Sigmon Coal Company, as a related person to Jericol ) is responsible for some eighty-six miners and beneficiaries who worked for the Shackleford Coal Company ("Shackleford"), a Kentucky company unrelated to Jericol or Sigmon.

The circumstances surrounding the Jericol assignments at issue are quite similar to the Crystal Block miners who were assigned to USX. In 1973, Shackleford sold its coal mine to Irdell Mining Company, which was subsequently named Jericol Mining Company. The sale was a bona fide, arms length transaction between two unrelated parties and there is no allegation or evidence that the transaction was motivated by any desire to avoid benefit liabilities. In accordance with the terms of the asset sales agreement, Jericol assumed the applicable NBCWA and operated the mine in accordance with the provisions of that labor agreement, including the obligation to make appropriate contributions to the UMWA Benefit Plans. Pet. App. 8a-10a, 68a-69a; R. 34-37, 211-212, 217.

In a series of decisions, the Commissioner assigned financial responsibility to Jericol for 86 retired miners (and their dependents) who had worked for Shackleford. The

purported basis for the assignments of these unrelated retired miners to Jericol was the Commissioner's assertion that the Coal Act permitted him to assign miners of a defunct signatory operator to its related persons, including a defunct signatory operator's successors in interest. In so doing, however, the Commissioner ignored the plain language of the Coal Act and interpreted it in such a way that it imposed substantial additional financial responsibility on an operator who had never employed or otherwise benefited from the retired miners it was now forced to pay for.

## SUMMARY OF THE ARGUMENT

The plain language of the Coal Act controls the outcome of this case. Under a plain meaning interpretation, Section 9701(c)(2)(A) does not permit the Commissioner to treat a signatory operator's successors in interest as related persons, or to treat mere asset purchasers as successors in interest. This plain meaning interpretation is corroborated by several rules of construction, including the rule that when Congress uses language in one section but omits it from another, the omission should be viewed as intentional, and the rule against rendering any provision mere surplusage.

Moreover, a plain meaning interpretation of Section 9701(c)(2)(A) does not frustrate the Coal Act's purpose. The Coal Act was intended to remedy the UMWA trust funds' financial difficulties by imposing liability on those who benefited from the retired miners' services. Purchasers (such as USX) neither caused the problems the trust funds experienced, nor benefited in any way from the services of a seller's retired miners. Indeed, USX continuously operated under NBCWAs and never "dumped" any retiree obligations on any other operators. Consequently, the Coal Act's



purpose is not served in the least by making asset purchasers liable for a seller's retired miners.

Further, there is no fundamental inconsistency between imposing liability on a related person's successors in interest, but not a signatory operator's successors in interest. The former is part of Congress' overall scheme for preserving Coal Act liability on a post-enactment basis, whereas the latter presents very difficult questions of pre-enactment successor liability that Congress quite clearly chose to avoid.

As the USX situation vividly illustrates, trying to impose pre-enactment successor liability on operators in an industry where mines have been owned by multiple parties over several decades raises a host of difficult questions and issues of fundamental fairness. For example, why should an asset purchaser who paid for the assets it received be held responsible for retired miners it never employed, much less for retired miners who worked at a seller's other mines? Why should an asset purchaser be liable for a seller's retired miners if it subsequently sold those assets to another operator? If the second purchaser goes out of business, why should a third purchaser be responsible for the first and the second seller's retired miners? Why should other operators who actually employed a retired miner be dropped from consideration for possible assignment in favor of successive purchasers who never employed the retired miners or benefited from their services?

Congress' careful and limited use of the successor in interest language quite clearly resulted from its desire to avoid these and other difficult questions that arise when trying to make a signatory operator's successors in interest related persons. Indeed, given the extensive history of coal mine sales in this industry, the implausibility that Congress

inadvertently failed to address this important issue, or left these difficult questions to the discretion of an agency that has no particular expertise with respect to such issues or the coal industry, mandates a rejection of the Commissioner's position in this case.

## ARGUMENT

### A. The plain language of Section 9701(c)(2)(A) and the rules of statutory construction compel a finding that Congress did not intend to make the successors in interest of signatory operators related persons, or to make mere asset purchasers successors in interest.

#### 1. Plain Meaning

"The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993). Thus, courts must begin with the presumption that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

The Commissioner's arguments notwithstanding, there can be little doubt that the plain language of Section 9701(c)(2)(A) of the Coal Act does not extend related person status to the successors in interest of signatory operators. Section 9701(c)(2)(A) provides as follows:

> Related persons. (A) In general. A person shall be considered to be a related person to a signatory operator if that person is --



> (i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

The Commissioner's assertion that a signatory operator is a "person described in clauses (i), (ii), or (iii)" is untenable.

Section 9701(c)(2)(A) identifies persons who are related to signatory operators. As such, it hardly can be viewed as including signatory operators within the class of persons who are related to signatory operators. Indeed, that would be a strange way of saying that successors in interest of signatory operators are related persons. Thus, the plain meaning of the language in Section 9701(c)(2)(A) does not make the successors in interest of signatory operators related persons.

Moreover, the Commissioner is not only seeking to read Section 9701(c)(2)(A) in a strange fashion, he is seeking to engraft an untenable meaning on the term "successor in interest." The Commissioner assumes that the terms "successor in interest" and "successor" are synonymous, and then uses a labor law successor standard to define the terms. Nevertheless, the terms are not synonymous, and when properly defined, the term "successor in interest" has no application to an asset purchaser.

Three Courts have observed that, because the Coal Act is part of the Internal Revenue Code, the phrase "successor in interest" should mean the same under the Coal Act as it does in Treasury Reg. Section 1.1503-2(c)(12) (which deals with a tax free exchange in which the acquiring corporation succeeds to the tax attributes of the selling corporation in a transaction subject to IRS Code Section 381). *Holland v. New Era Coal Company*, 179 F.3d 397, 402-3 (6th Cir. 1999); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.* 201 B.R. 163, 171 (S.D. W. Va. 1996), *aff'd on other grounds*, 99 F.3d 575 (4th Cir. 1996); *In re Lady H Coal Co., Inc.*, 199 B.R. 595 (S.D.W.Va. 1996). In *New Era*, the Sixth Circuit described the types of transactions that satisfy the requirements of Section 381 as follows:

> Section 381 applies to transfer of assets (I.R.C. § 368(a)(1)(D)), liquidations of 80% owned subsidiaries (I.R.C. § 332), statutory mergers and consolidations (I.R.C. § 368(a)(1)(A)), nominal changes in corporate organization (I.R.C. § 368(a)(1)(F)), exchange of assets for voting stock (I.R.C. § 368(a)(1)(C)), transfer of substantially all assets between companies under common control, transfers of assets for stock of [an] acquiring corporation [and] related corporations in a bankruptcy reorganization (IRC § 368(a)(1)(G)).

179 F.3d at 401-2, fn. 1.[4]

Accordingly, to be a "successor in interest" for purposes of the Coal Act, one must be more than a labor law successor - one must have acquired the predecessor's assets or stock in a transaction qualifying under Section 381 of the Internal Revenue Code. Therefore, even if Section 9701(c)(2)(A) of the Coal Act is interpreted to encompass the successors in interest to signatory operators, that would not make one who simply purchased the assets of a coal mine a successor in interest.

In short, the Commissioner's position in this case ignores the plain meaning of the language Congress used to reflect its intent in Section 9701(c)(2)(A), which language plainly does not make a signatory operator's successor in interest a related person, and does not make an asset purchaser a successor in interest.

**2. Intentional Exclusion**

"Where Congress includes particular language in one section, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in its disparate inclusion or exclusion." *Duncan*

[4] Transfers under Section 368(a)(1)(D) are ones involving a transfer of assets from one corporation to another where one of the stockholders in the first corporation is or becomes the controlling stockholder in the second.

*v. Walker*, 121 S. Ct. 2120, 2125 (2001) *quoting Russello v. United States*, 464 U.S. 16, 23 (1983). Here, Congress addressed the rights and obligations of "successors" in several locations in addition to Section 9701(c)(2)(A), including Subchapter B, which concerns the Combined Fund, and Subchapter C, which concerns Individual Employer Plans ("IEPs") and the United Mine Workers of America 1992 Benefit Plan ("1992 Plan").

The successorship provision concerning the Combined Fund - Section 9706(b)(2) - states that "if a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary ... to such successor ... [but] the assigned operator transferring such assignment ... shall remain the guarantor of the benefits ...." Of the two successorship provisions involving IEPs and the 1992 Plan, one – Section 9711(g)(2) - is nearly identical to Section 9706(b)(2). The other – Section 9711(g)(1) - provides that, for purposes of Subchapter C, "[t]he term 'last signatory operator' shall include a successor in interest of such operator."

By expressly addressing successorship in Sections 9701(c)(2)(A), 9706(b)(2), and 9711(g)(1) and (2), there can be no doubt that Congress was aware of the concept. Therefore, Congress' use of language imposing liability on certain successors and certain successors in interest, but not others, must be viewed as intentional under *Duncan* and *Russello*.

Indeed, this point in underscored by the Court's recent analysis of a similar issue in *Duncan*. There, the Court sought to decide whether a federal habeas corpus petition was an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2). After



observing that, in other places within the same statute, Congress used the words "State" and "Federal" to denote state and federal proceedings, the Court held that the absence of a reference to "Federal" in Section 2244(d)(2) demonstrated Congress' intent to limit that provision to state proceedings:

> We find no likely explanation for Congress' omission of the word "Federal" in § 2244(d)(2) other than that Congress did not intend properly filed applications for federal review to toll the limitation period. It would be anomalous, to say the least, for Congress to usher in federal review under the generic rubric of "other collateral review" in a statutory provision that refers expressly to "State" review, while denominating expressly both "State" and "Federal" proceedings in other parts of the same statute.

*Duncan*, 121 S. Ct. In like manner, there is no good explanation for Congress' omission of a specific reference to the "successors" or "successors in interest" to signatory operators in Section 9701(c)(2)(A), particularly given the specific reference to the successor in interest to last signatory operators in Section 9711(g)(1), and the reference to successors in Sections 9706(b)(2) and 9711(g)(2), other than that Congress did not intend to make signatory operators' successors or successors in interest related persons.

### 3. Giving Effect to All Terms

This Court's decisions "consistently have expressed 'deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868,

877 (1991). *See also Duncan*, 121 S. Ct. at 2125 *citing Williams v. Taylor*, 520 U.S. 362 (2000), for the proposition that this is a "cardinal principle of statutory construction." Thus, it is the Court's "duty 'to give effect, if possible, to every clause and word of a statute' ... rather than emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Here, construing Section 9701(c)(2)(A) as making the successors in interest of signatory operators related persons and violates this rule.

As mentioned above, Section 9711(g)(1) states that, for purposes of Subchapter C, "[t]he term 'last signatory operator' shall include a successor in interest of such operator." If the successor in interest of a signatory operator already was a "related person," however, then Section 9711(g)(1) would be surplusage. This is because Sections 9711(c) and 9712(d)(4) separately extend a signatory operator's Subchapter C obligations to its "related persons."[5]

On the other hand, if the term "related person" does not include a signatory operator's successors in interest, then Section 9711(g)(1) makes sense as imposing a limited form of liability for a last signatory operator's successors in interest.

[5] Section 9711(c) provides that "[e]ach related person of a signatory to which subsection (a) or (b) [relating to IEP obligations] applies shall be jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b)." Section 9712(d)(4) provides that "[a] 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid under this Section."



### 4. Not Inferring Additional Remedies

"A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 94, n. 30 (1981). Here, the Coal Act explicitly sets forth a detailed remedial scheme for imposing liability on signatory operators and other persons. Under these circumstances, expanding Section 9701(c)(2)(A) to include the successors or successors in interest of signatory operators is unwarranted, and amounts to an impermissible rewriting of the statute. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 463 (1987) ("Respondent's position depends upon the addition of words to a statutory provision which is complete on its face. Adoption of their view would require amendment rather than construction of the statute, and it must be rejected here.").

In sum, the language used, as well as several well-settled rules of statutory construction, demonstrate that Congress meant exactly what it said in Section 9701(c)(2)(A).

## B. To the extent the Coal Act's purpose is relevant, construing Section 9701(c)(2)(A) in accordance with its plain meaning furthers that purpose.

A court must be wary of construing a statute based on its purported purpose:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the

> dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of Congressional intent.

*Board of Governors of the Federal Reserve System v. Dimensions Financial Corporation,* 474 U.S. 361, 373-74 (1986). For this reason, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

Indeed, it is one thing to use a statute's purpose to find present language that is essential to the operation of a federal scheme. It is quite another to find, as the Commissioner asks this Court to do, that interpreting Section 9701(c)(2)(A) as including the successors in interest of signatory operators is necessary to more effectively achieve the Coal Act's purpose:

> Finally, the [Government] retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes [citation omitted]. That principle may be invoked, in the case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme;



> but it does not add features that will achieve the statutory "purposes" more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two.

*Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Company*, 514 U.S. 122, 135 - 36 (1995).

Given the plain language of Section 9701(c)(2)(A) and the consistency with which that plain meaning interpretation fits with several rules of construction, there simply is no reason to consider the Coal Act's purpose. Nevertheless, to the extent the Coal Act's purpose is material, the Commissioner's interpretation of Section 9701(c)(2)(A) does not further the Coal Act's purpose and, if anything, is contrary to that purpose.

Congress enacted the Coal Act to remedy the threat to the financial stability of the coal industry trust funds that had been caused, in large measure, by coal operators withdrawing from the coverage of the NBCWAs and operating union free or by going out of business altogether, and thereby leaving the remaining signatories to absorb the increasing cost of their retirees. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 510 (1998). Thus, Congress imposed liability on those who had employed the retired miners and thereby benefited from their services, as well as those who, because of common ownership and control with the employer, also financially benefited from the retired miners' services. *Id*, 524 U.S. at 514.

That said, imposing related person liability on a signatory operator's successors or successors in interest does not help to achieve the objective of holding liable those who caused the trust funds' financial problems and benefited from the retired miners' services. First, notwithstanding the Commissioner's unsupported statements to the contrary, Congress did not have any reason to believe that sales from one signatory to another caused or contributed to the trust funds' financial instability. Indeed, USX continued to contribute to the UMWA trust funds and provide retiree medical benefits directly to its retired miners (through its Individual Employer Plan) long after it purchased the Crystal Block mine. Consequently, purchasers in these types of situations could not reasonably have been considered to have caused the financial instability of the trust funds, much less to have "dumped" any legitimate retiree medical benefit obligations on any other operators.

Second, the objective of imposing liability on those who benefited from the miners' services is not furthered in the least by imposing related person liability on a signatory operator's labor law successors. Neither Jericol nor USX ever had any employment relationship with the miners at issue. Consequently, Jericol and USX are being subjected to the very evil the Coal Act sought to eliminate – the "dumping" of retiree medical benefit obligations on responsible operators who never employed or benefited from the retired miners' services.

Third, the fact that Jericol and USX purchased assets from the operators who had employed the subject retired miners is too thin a reed upon which Congress reasonably could have intended to impose liability. As the Court below astutely observed, "[t]o the extent that the retired Shackleford miners conferred a benefit on Jericol, such as improving the



physical assets of the operation or advancing the goodwill of the company through their hard work, Jericol presumably paid fair market value for these benefits under the terms of the asset purchase." *Sigmon Coal Company, Incorporated v. Apfel*, 226 F.3d 291, 306 (4th Cir. 2000). That point is even more compelling in USX's case, where most of the assigned retired miners never even worked at the mine that USX purchased.

In sum, even if one can rely on the Coal Act's purpose to resolve the statutory construction issue presented here, the fact of the matter is that the Coal Act's purpose is not furthered by reading Section 9701(c)(2)(A) as encompassing the successors or successors in interest of signatory operators. Sales such as those at issue here did not cause the problems that led to the Coal Act's passage, and purchasers such as USX, who did not evade or avoid any retiree benefit obligations, cannot reasonably be viewed as Congressional targets of lifetime responsibility for a defunct seller's retired miners.

### C. The fact that Congress chose to impose related person liability on the successors in interest of related persons, but not the successors in interest of signatory operators, was a rational legislative decision.

A core part of the Commissioner's argument is that it makes no sense to impose liability on the successors in interest of the designated related persons, and for certain purposes involving the 1992 Benefit Plan and Individual Employer Plans, the successors in interest of last signatory operators, but not on the successors in interest of signatory operators. The Commissioner, however, perceives an inconsistency that does

not exist, and Congress had good reasons for the choices it made.

**1. Imposing liability on the successors in interest of the designated related persons in Section 9701(c)(2)(A) makes sense as part of Congress' overall scheme for addressing post-enactment attempts to avoid liability.**

As a preliminary matter, the reference in Section 9701(c)(2)(A) to a related person's successors in interest is one of three provisions that seek to preserve post-enactment liability. Section 9701(c)(2)(B) provides that the relationships described in clauses (i) – (iii) of Section 9701(c)(2)(A) shall be determined as of the earlier of July 20, 1992, or the date the signatory operator went out of business; however, that Section does not address when successors in interest to the designated related persons should be determined. Therefore, one way to interpret this successorship provision is to read it as having been intended to insure that those succeeding to a related person's tax attributes after the Coal Act's enactment would remain liable for the related person's obligations.[6]

Indeed, such an interpretation of Section 9701(c)(2)(A) reasonably fits with two other provisions Congress enacted to preserve Coal Act liability in the event of post-enactment sales by signatory operators. For example, as mentioned above, Sections 9706(b)(2) and 9711(g)(2) provide that post-enactment successors may assume a signatory operator's

[6] Despite the extensive amount of litigation concerning the liability of a signatory operator's successors in interest, undersigned counsel is not aware of any instances in which liability has been imposed on the successor in interest of a related person for periods prior to the Coal Act's enactment (or afterwards for that matter).



obligations under the Coal Act, but that the signatory operator and its related persons shall remain guarantors of those obligations. Thus, taken together, Sections 9706(b)(2), 9711(g)(2), and the successor in interest language in Section 9701(c)(2)(A), provide a complete scheme for preserving Coal Act liability in the context of post-enactment transactions.

**2. The difficulties and unfairness of making a pre-enactment signatory operator's successors in interest related persons easily explain why Congress did not make such successors in interest related persons.**

The answer to why Congress confined pre-enactment liability for retired miners in the Combined Benefit Fund to signatory operators and the designated related persons quite likely lies in the difficulties and unfairness of imposing such liability on the successors or successors in interest of signatory operators. For example, imposing liability on a pre-enactment purchaser of a signatory operator's assets raises numerous unanswered questions and presents an array of fundamental fairness issues, including the following:

1. Who among a mine's various owners should receive a defunct seller's assignments? For example, as between USX, the second owner of Crystal Block's mine, and Old Ben Coal Company, its third and current owner, who should be responsible for Crystal Block's retired miners and why? The Commissioner arbitrarily determined that the liability should go to the first purchaser and then proceed down the purchaser trail until an active purchaser (or active related person) can be found. Pet. App. at 87a; Jt. App. at 103. Nevertheless, what benefit did USX receive that Old Ben Coal Company did not also receive? Indeed, given the long and varied ownership history of many mines prior to the Coal

Act's enactment, choosing an appropriate purchaser upon whom to foist liability for a defunct seller's retired miners is difficult, to say the least.

2. Why should an operator that purchased one of a seller's several mines be responsible for all of the seller's retired miners? For example, why should USX be responsible for miners who worked at Crystal Block mines that USX did not purchase? Indeed, if USX was defunct, why should Old Ben Coal Company receive all of the Crystal Block assignments, as well as all of USX's thousands of assignments, simply because Old Ben Coal Company purchased the Crystal Block mine from USX in 1981? In short, there is no rational connection between the purchase of a single mine and responsibility for hundreds if not thousands of miners who worked at the seller's other mines, much less those who worked at the mines of a prior seller.

3. Why should an asset purchaser be considered a last resort? In other words, if the purchaser is a related person under Section 9701(c)(2)(A), as the Commissioner submits, then what basis does the Commissioner have for arbitrarily creating a priority among the respective related persons? Obviously, assigning retired miners to a specifically designated related person ahead of a purchaser makes sense from a fairness perspective; however, from a statutory construction perspective, nothing in the statute authorizes such a priority. Consequently, the absence of such a priority suggests that none was intended - which hardly seems fair - or, more likely, that Congress did not address this subject because it did not intend to make asset purchasers related persons.

4. Assuming the first purchaser of a mine is out of business, does responsibility for the seller's retired miners



then shift to the next purchaser of that mine, or does it first proceed to the initial purchaser's own related persons? For example, if USX was out of business, would the Crystal Block miners go to one of USX's related persons, or would they go to Old Ben Coal Company? Logically, under the Commissioner's view of Section 9701(c)(2)(A), if USX is liable as a related person to Crystal Block, then all of USX's related persons are equally liable for the Crystal Block miners ahead of Old Ben Coal Company; however, the connection between USX's related persons and the Crystal Block miners is so attenuated that it is hard to believe Congress intended for USX's related persons to be responsible ahead of the mine's subsequent owner(s).

5. Why should other signatory operators who actually employed Crystal Block's retired miners be ignored as possible assignees? Once the Commissioner determines that a particular signatory operator should receive an assignment, he proceeds to assign the miner to the signatory operator or any of its related persons who are still in business (including their purchasers). By doing so, the Commissioner overlooks the possible assignment of such miners to other operators who actually employed them and still may be in business.

For example, if Crystal Block employed a miner from 1950 to 1960, but Signatory Operator A, another pre-1978 signatory that is still in business, later employed the miner from 1960 to 1969, the Commissioner would still assign the miner to Crystal Block, and then to USX, as Crystal Block's putative successor in interest. As a result, USX would be assigned responsibility for a miner it never employed, and Signatory Operator A, who actually employed the miner for a substantial period of time, would be let off the hook.

Congress was aware of the extensive history of coal mine sales over the four decades preceding the Coal Act's passage. Indeed, Congress must have been aware that three Circuit Courts had already resolved contentious disputes concerning mine sales that turned on the meaning of the words used in the NBCWA's successorship clause. *See United Mine Workers of America International Union v. U.S. Steel Mining, Inc.*, 895 F.2d 698 (10th Cir. 1990); *In re Chateaugay Corporation*, 891 F.2d 1034 (2d Cir. 1989); *District 17, United Mine Workers of America v. Allied Corporation*, 765 F.2d 412 (4th Cir. 1985), *cert. denied*, 473 U.S. 905 (1985). Therefore, given this historical context, if Congress had intended to impose liability on pre-enactment mine purchasers, it most certainly would have done so with carefully chosen words that clearly addressed at least some of these difficult issues. *See Whitman v. American Trucking Associations, Inc.*, 121 S. Ct. 903, 910 (2001)("The implausibility of Congress' leaving a highly significant issue unaddressed (and thus delegating its resolution to the administrative agency) is assuredly one of the factors to be considered in determining whether there is ambiguity."), *quoting Christensen v. Harris County*, 529 U.S. 576, 590 (2000)(Scalia, J., concurring in part and concurring in judgment).

The implausibility of Congress having mistakenly overlooked these difficult and important successorship issues, or left them to the agency to resolve on an ad hoc basis, weighs heavily in favor of finding that Congress intentionally omitted successors in interest of signatory operators from the definition of related persons. This is particularly true given that the Social Security Administration has no particular expertise in dealing with successorship issues, the coal industry, or the singularly complex history of successorship disputes in the coal industry. *See, e.g., Board of County Commissioners v. Isaac*, 18 F.3d 1492,1497 (10th Cir.



1994)("An agency's interpretation of its own regulation is not entitled to great deference if it is based on general common law principles rather than the agency's expertise...."); *Bambidele v. Immigration & Naturalization Service*, 99 F.3d 557, 561 (3d Cir. 1996)(little deference is owed when the dispute involves a legal issue that is not within the agency's particular expertise, such as the interpretation of a statute of limitations).

Finally, the fact that Congress extended liability to the successors in interest of last signatory operators under Section 9711(g)(1) for purposes of Individual Employer Plans and the UMWA 1992 Benefit Plan, but not to the successors in interest of signatory operators generally, also makes sense. Individual Employer Plans went into effect with the NBCWA of 1978. Thereafter, operators who sold their mines had to require the purchasers to assume their obligations under the NBCWA, including their obligations under an Individual Employer Plan. *See Allied Corporation, supra*. Thus, unlike the operators who purchased mines before 1978, and had no contact with the seller's retirees, purchasers from 1978 on generally had direct contact with the seller's retirees because they had to provide the seller's retirees with medical benefits. Under these circumstances, making a last signatory operator's successors in interest liable for the defunct operator's retirees is based on a legitimate connection between the retirees and the successor in interest, and did not pose the vast array of difficult problems and issues of fairness that come with trying to make a pre-enactment signatory operator's purchaser a related person.

In sum, Congress' decisions with respect to what it did and what it did not do with successors or successors in interest, reflect an awareness of the difficulties of obtaining a consensus on the legislation, and a determination not to delve

into the complicated thicket of trying to impose liability on pre-enactment successors or successors in interest. Therefore, the Court is bound by the plain language Congress used to reflect the choices it made, one of which was to limit related person liability to the specific entities identified in Section 9701(c)(2)(A)(i) – (iii), and their successors in interest.

## CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

LARRY G. MASSANARI,
ACTING COMMISSIONER OF SOCIAL SECURITY
*Petitioner*,

v.

SIGMON COAL COMPANY, INC. AND
JERICOL MINING, INC.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF *AMICUS CURIAE* R.G. JOHNSON COMPANY, INC., IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICUS CURIAE* R.G. JOHNSON COMPANY, INC.

This brief *amicus curiae* is filed in support of the Respondents, Sigmon Coal Company, Inc., *et al.*[1] R.G. Johnson Company, Inc., is a party to the primary case cited by the government as creating the split in the circuits on the issue presented here. *R.G. Johnson Company, Inc. v. Apfel*, 172 F.3d 890 (D.C. Cir. 1999). R.G. Johnson believes that the opposing point of view from *R.G. Johnson* should be available for the Court's use as it considers the government's position. The Court should not be limited to what the government has chosen to bring to the Court's attention, as supplemented by the trustees of the United Mine Workers of America Combined Benefit Fund.[2]

R.G. Johnson also has a direct interest in the outcome of the Sigmon case now before the Court. The court of appeals in *R.G. Johnson* remanded the case to the district court where it is still pending. The Court's decision in Sigmon's case could affect, if not control, the issues which are the subject of the ongoing district court proceedings in R.G. Johnson's case. Because of the potential consequences, R.G. Johnson urges the Court to consider the additional background material and arguments, including a summary of relevant events ignored by the government, set forth below.

---

[1] This brief is filed concurrently with the written consents of the parties. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae* has made a monetary contribution to the preparation and submission of this brief.

[2] The trustees of the Combined Fund, appearing as *amicus curiae* in support of the government in this case, were defendant-appellants in *R.G Johnson*.

## STATEMENT OF THE CASE

The government has framed the issued in the case before the Court as whether the Coal Industry Retiree Health Benefit Act of 1992 permits the Commissioner of Social Security to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business. As discussed more fully below, the same issue arises in R.G. Johnson's case. The government assigned beneficiaries (retirees and their dependents) to R.G. Johnson based the retirees' one-time employment by another company which was found to be no longer in business for Coal Act purposes. While the government did not consistently represent the basis for the assignment at various stages of the process for making and reviewing assignments, it eventually settled on the "successor in interest to the signatory operator" theory. R.G. Johnson's case therefore presents a comparable case for the Court's consideration.

### A. The government's assignments to R.G. Johnson

R.G. Johnson was first notified of its potential liability under the Coal Act in 1995. The government sent form letters to R.G. Johnson informing it of the assignment of 15 beneficiaries based on the retiree-beneficiaries' former employment by a different company with a similar name, "The R.G. Johnson Company." The old company had itself been assigned the beneficiaries in question in 1993, but the government had overturned those assignments apparently because the old company, while still in existence, was found to be no longer in business.[3]

R.G. Johnson is a closely-held Pennsylvania company incorporated in 1988. As of 1988, the old company, a

[3] The general background of R.G. Johnson's case is set forth in the district court's decision , *R.G. Johnson v. Apfel*, 994 F.Supp. 10 (D.D.C. 1998), and the court of appeals' decision setting aside the district court's decision, 172 F.3d 890.



Delaware corporation, had been in the business of performing shaft and slope construction for coal company customers for many years. It had been signatory to collective bargaining agreements with the United Mine Workers of America covering construction work and had been a member of the Association of Bituminous Contractors, Inc., a multiemployer bargaining association whose members are construction contractors.[4]

In April 1988, R.G. Johnson purchased the operating assets and certain real estate from the old company. It embarked on the business of shaft and slope construction under wholly new ownership. While R.G. Johnson employed many individuals who were formerly employed by the old company, it never employed the retirees who were subsequently assigned to it by the government.

In response to the government's notices, R.G. Johnson denied that it was properly liable for the individuals it had been assigned. Eventually, the government affirmed the assignments by way of summary dispositions that never fully explained the government's rationale. The government alternately claimed that R.G. Johnson was a "related person" to the old company, or that it was a "successor" to the old company. R.G. Johnson then brought suit in federal court against both the government, who made the assignments, and the Combined Fund, which collects premium payments based on the number of beneficiaries assigned by the government.

The district court granted summary judgment in R.G. Johnson's favor. The district court agreed with R.G. Johnson that the definition of "related person" does not include a successor in interest to a signatory operator and that the legislative history offers no basis for rejecting the plain meaning of the statute.

[4] ABC's history of collective bargaining with the UMWA and its experience under the Coal Act is recounted in *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998).

## B. The court of appeals' decision in *R.G. Johnson* and the nature of the split in the circuits

On appeal, the District of Columbia Circuit agreed with both of the district court's conclusions on what the statute, as written, says. That is, it does not support the government's position either on its face or in light of its legislative history. Nevertheless, the panel majority (Circuit Judge Williams and Senior Circuit Judge Buckley) ultimately ruled against R.G. Johnson on the statutory interpretation issue, finding that this was one of those rare cases in which the plain language of a statute could be ignored because a literal application of the statute's provisions would produce a result at odds with its drafters' intentions. In dissent, Circuit Judge Randolph explained why construing the statute as written does not render it inscrutable and why the majority's alternative approach is problematic.

Consistent with the District of Columbia Circuit's decision, the Fourth Circuit in the case now before the Court similarly rejected any claim of literal statutory support for the government's position. Where the Fourth Circuit majority split with the District of Columbia Circuit majority was on the question of whether there was any justification for refusing to apply the statute as written. On that particular point, the Fourth Circuit majority agreed with Circuit Judge Randolph's conclusion and refused to depart from the plain language of the statute. Circuit Judge Murnaghan, in dissent, would have followed the majority opinion in *R.G. Johnson*.

In *Eastern Enterprises v. Chater*, 110 F.3d 150, 154-55 (1st Cir. 1997), reversed on other grounds, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the First Circuit had previously reached the same conclusion as the Fourth Circuit. The Eastern Enterprises case is noteworthy because the government there argued successfully in favor of the position which it is now asking this Court to reject. Specifically, the government endorsed an interpretation of the statute which is



consistent with the position taken by R.G. Johnson and respondents in the case now before this Court.[5] The government's current brief to the Court provides no explanation for the government's change of course since its victory before the First Circuit in *Eastern Enterprises v. Chater*.[6]

In an unpublished decision, the Third Circuit relied on the majority opinion in *R.G. Johnson* to find in the government's favor. *Aloe Energy Corp. v. Apfel*, No. 99-3915 (June 20, 2000), petition for cert. pending, No. 00-725. The Third Circuit's decision indicates an acceptance of both holdings from *R.G. Johnson*, namely that the plain meaning of the statute does not support the government but that this is an exceptional case in which the government nonetheless prevails. As this summary of the circuit court decisions suggests, the split in the circuits on the issue currently before the Court rests in large part on the parsing of historical events. The government's current position is that Congressional intent to sanction the assessment of liability against the "successor in interest to the signatory operator" can be gleaned from this history. The court of appeals below found no justification for this type of successor liability. In order to present the Court with a full picture of these historical events, a summary of the legislative proposals which preceded the Coal Act are described below.

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[5] The pertinent parts of the government's brief at the district court level in the Eastern Enterprises case were included in the R.G. Johnson record and are attached to this brief at 1a-8a.

[6] In its petition for a writ of certiorari to the Court in this case, the government made the misleading statement that the First Circuit "rejected the Commissioner's position." Pet. at 13. To the contrary, the First Circuit, in a unanimous decision, accepted what was then the government's position. The First Circuit had no opportunity to consider what is now the government's stated position.

## C. The legislative setting for enactment of the Coal Act.

The Coal Act represents a legislative response to what Congress found to be a crisis in the previously private mechanism for funding the health care of retired coal miners represented by the United Mine Workers of America and their dependents. Solutions to the underlying problem of funding retiree benefits were attempted in the context of collective bargaining beginning in 1974, but the problem defied conclusive resolution and caused recurring strife in the 1970's and 1980's. The Court recounted this history in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), *supra*.

The first legislative solution was proposed in 1989. This proposal was entitled the "Coal Industry Health Benefit Stabilization Act of 1989." S.1708, 101st Cong., 1st Sess. It would have imposed withdrawal liability in the context of medical benefit plans, *i.e.* it would have required employers who ceased to contribute to the plans to pay a proportionate share of the benefit plan's calculated future liability. This approach was patterned on the well-known pension plan withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980. *See* 135 Cong. Rec. S12312 (October 2, 1989).

The Stabilization Act enjoyed joint labor-management support by the UMWA and certain large coal producing companies whose employees were represented by the UMWA. Because of this initial show of support, the Senate Finance Committee which undertook consideration of this proposal in connection with the Budget Reconciliation Act was apparently unaware that there would be any significant opposition to the substance of the proposal. Once the proposal became widely known, however, opposition arose. The apparent lack of a deliberative process fueled additional opposition to the 1989 proposal, and it was withdrawn from the budget process.

In light of this experience, supporters of a legislative response took steps to improve the public perception of the



process and the consideration of alternative solutions. In 1990, then Secretary of Labor Elizabeth Dole announced the creation of the Advisory Commission on United Mine Workers of America Retiree Health Benefits, the so-called Coal Commission. The Chairman of the Coal Commission was former Secretary of Labor William J. Usery and the Vice Chairman was law professor law Henry H. Perritt, Jr. The members of the Coal Commissioner included the president of the UMWA, representatives from three companies engaged in coal mining (Bethlehem Steel Corporation, Pittsburg and Midway Coal Mining Company and Peabody Coal Company) and representatives of organizations in the health and actuarial fields.

The three coal mining companies with members on the Coal Commission were all parties to collective bargaining with the UMWA. There were no representatives from non-union coal mining companies or from companies who had once had some historical connection to the UMWA but no longer did. There were also no representatives from the construction industry.[7]

The Coal Commission gathered information from a number of sources and issued a report on November 5, 1990.[8] While, as expected, the report contained a number of recommendations, it did not include a consensus on the appropriate financial solution. A majority of the Coal Commission endorsed an industry-wide tax on coal while the dissenting members of the Coal Commission argued that the problem was created by the limited UMWA-represented segment of the industry and a solution should similarly be limited to this segment.

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[7] While it is perhaps obvious, for the record it should be noted that R.G. Johnson was not a party to the Coal Commission's proceedings.

[8] According to the brief filed by the trustees of the Combined Fund, a copy of the Coal Commission report has been lodged with the Court. Brief of the Trustees as *Amici Curiae* at 3, n.4.

The absence of majority support for an industry-wide tax is particularly striking since the Commission did not include representatives from the non-UMWA represented segment of the industry. Former signatories to UMWA agreements, as well as the non-union coal producers, had the opportunity to appear and submit statements prior to the issuance of the Coal Commission's report, *see* report at 117 and 119 (Appendix 8 and Appendix 9), but had no opportunity to review or comment on the recommendations contained in the report in advance of its issuance.[9] Thus, parties who were likely to have the strongest objection to legislative action patterned on the majority's recommendation had no voice in preparing the report. Even so, the Commission still could not garner unanimous support for its industry-wide approach. The Coal Commission's recommendations would likely have been different if all of the potentially affected parties had had a voice on the Commission itself.

Following issuance of the Coal Commission's report, hearings were held by the Senate Finance Committee's Subcommittee on Medicare and Long-Term Care in 1991.[10] In November 1991, a new legislative proposal was introduced, entitled the "Coal Industry Retiree Health Benefit Act of 1991." S.1989, 102nd Cong., 1st Sess. This proposal would have created a "Coal Industry Retiree Health Benefit Corporation," whose five-member board of directors was to consist of private parties chosen from labor and management and appointed by the Secretary of Labor. This corporation would have been responsible for collecting "premium" payments imposed on coal tonnage and employee hours in addition to per beneficiary "premiums" assessed against the beneficiary's former employer or last signatory operator. *See* 137 Cong.Rec. S17061 (Nov. 19, 1991).

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[9] Also excluded were parties, such as R.G. Johnson, who were unaware that the Commission might make a recommendation that would not be construed as affecting them until some distant point in the future.

[10] Again, R.G. Johnson was not a party to these proceedings.



Despite the careful choice of terminology avoiding use of the word "tax," this legislation was nonetheless viewed as imposing a tax on coal production. In March of 1992, a revised version of the bill, which was still based on the tax approach and given the updated title, "Coal Industry Retiree Health Benefit Act of 1992," was introduced. *See* 138 Cong. Rec. S3433 (March 12, 1992). It was included in the "Tax Fairness and Economic Growth Act of 1992," which was vetoed by then President George Bush on March 20, 1992.

The version of the "Coal Industry Retiree Health Benefit Act of 1992" which eventually became law was introduced by Senator Rockefeller on July 29, 1992. It was significantly unlike its similarly named predecessors in several respects. It did not include any type of direct tax on coal production or hours worked in the industry. Rather, it incorporated features from the competing proposals which had anticipated transfers of funds from the Abandoned Mine Lands Trust Fund and from the UMWA 1950 Pension Fund.[11] Most significantly, it contained a wholly new funding feature which had not previously appeared in any of the legislative proposals dating from 1989, 1991, or earlier in 1992, namely, the creation of a private body, the Combined Benefit Fund, which would be run by private individuals but whose beneficiaries would be assigned to former employers by a governmental body.[12]

The version of the legislation under consideration in July 1992 was the first instance which included a proposal for the

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[11] On February 27, 1992, Representative Rahall had introduced H.R. 4344, which proposed a transfer of AML Funds to the government-sponsored corporation created by the 1991 version of the Coal Industry Retiree Health Benefit Act., S1989. It was intended to supplement the latter Senate bill. On April 8, 1992, Senator Boren had introduced a bill that would have transferred excess pension funds from the 1950 Pension Fund to the 1950 and 1974 Benefit Funds. S2550, 102nd Cong. 2nd Sess.

[12] Originally, the legislative record referred to the Department of Health and Human Services, but these duties are now with the Commissioner of Social Security. *See* Brief for the Petitioner at 6, n.4.

government to play any role in the assessment of liability against former employers. None of the prior proposals had anticipated the government generally, or the Social Security Administration in particular, taking an active part in identifying liable parties or otherwise administering a program of retiree benefits for UMWA retirees and their dependents.

### D. The July 27, 1992 Senate Legislative Counsel Draft of the Coal Act

While the above is a summary of legislative proposals that were introduced in Congress, there was significant behind-the-scenes activity before the emergence of the July 29, 1992 version of the legislation. During the week of July 20th, the White House had "jumped into talks" with key senators, focusing efforts on non-tax alternatives such as tapping the mine workers' over-supplied pension fund and setting up a system for assigning retired miners to companies linked to their original employers. Holly Idelson, *Bill to Set National Policy Remains Blocked Over Coal-Tax Provision*, 50 Cong. Q. Wkly. Rep. 2166 (July 25, 1992). On July 23, 1992, Senator Rockefeller held an afternoon news conference with the president of the UMWA to announce that the sides were "very close." *Id.* Negotiators worked through the weekend (July 25th and 26th) to reach an accord on the coal issue, and by July 28, 1992 were confident that a deal was set. Holly Idelson, *Bills to Cut Oil Dependence Finally Head to Conference*, 50 Cong. Q. Wkly. Rep. 2261 (August 1, 1992).

On Monday, July 27, 1992, two days before the version of the Coal Act which eventually became law was introduced, a draft proposal prepared by the Senate Legislative Counsel was circulating which is noteworthy by comparison to the Coal Act itself. This draft, taken from the record of the R.G. Johnson case, is attached to this brief at 10a-39a.

First, the Senate Leg. Counsel draft included a section setting forth "Findings and Declaration of Policy." Two findings were identical to those included with the Coal Act:



That the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest (finding (1) in both) and that, in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees (finding (1) in the Senate Leg. Counsel draft and finding (4) in the Coal Act). The Statement of Policy was also identical: To remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry; to allow for sufficient operating assets for such plans; and to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans. Appendix at 10a; 26 U.S.C. § 9701 (Historical and Statutory Notes).

The difference between the two is that the Senate Leg. Counsel draft included two other findings which did not accompany the later Coal Act: That an important element in the privately maintained benefit plans now experiencing financial difficulty has been the provision of health benefits for retirees of companies no longer contributing to the coal retiree health funds; and that withdrawals of contributing employers from privately maintained benefit plans maintained under collective bargaining agreements and covering retirees in the coal industry have resulted in substantially increasing funding burdens for employers that continue to contribute to such plans, adversely affecting the stability of labor-management relations in the coal industry.

Turning to the statutory provisions themselves, the Senate Leg. Counsel draft included identical definitions of general applicability (Section 9701) for plans and funds, agreements, and terms relating to operators, with the following significant exceptions.

First, the Senate Leg. Counsel draft defined a signatory operator in Section 9701(c)(1)(A) to mean a person which is or was a signatory to a coal wage agreement (the same as Coal Act Section 9701(c)(1)), or:

> (B) in the event a person described in subparagraph (A)is no longer in business, any successor to such person.

Appendix 13a. Next, while the "related person" definition was structured the same as the ultimate Coal Act provision (with three related person categories and an unnumbered catch-all provision at the end), the draft's category (iii) was different than the joint venture interest included in the Coal Act. The Senate Leg. Counsel draft instead referred to the Secretary of Health and Human Services[13] identifying any other person having an ownership or profit-sharing interest with a signatory operator in a business within the coal industry. *Id.* The catch-all provision was also different, in that it provided that "A related person shall also include a *successor* of any person described in clause (i), (ii), or (iii)." Appendix 15a (emphasis added). This is as opposed to a "successor in interest," the phrase used in the Coal Act.

Finally, the Senate Leg. Counsel draft included a specific definition of "successor," specifying that the term has the meaning given it under the National Labor Relations Act. Appendix 16a. There is no comparable definition of either "successor" or "successor in interest" in the Coal Act.

It is also noteworthy, that despite the specific provisions addressing signatory operator successor liability and defining what it means to be a successor, the catch-all provision in the "related person" definition was structured the same as the definition included in the Coal Act, *i.e.* with a reference to any person "described in clause (i), (ii) or (iii)." Appendix 15a.

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[13] As noted earlier, the role initially played by HHS now rests with Social Security.



The next statutory provisions establishing the Combined Fund (Section 9702), addressing plan benefits (Section 9703), setting forth the liability of assigned operators (Section 9704) and providing for transfer of assets from the 1950 Pension Plan and the AML fund (Section 9705) are the same in the Senate Leg. Counsel draft and the Coal Act. Section 9706, the provision under which the government assigns beneficiaries, is also identical in most respects, but differs from the Coal Act in certain respects which are pertinent here.

First, Section 9706(a) of the Senate Leg. Counsel draft directed the government to "assign each coal industry retiree who is an eligible beneficiary to a signatory operator which is in business" in a specified order. Appendix 30a. The Coal Act provision 9706(a) is the same, except that it includes the parenthetical "(or any related person with respect to which)" after the phrase signatory operator.[14]

Next, unlike Section 9706(b) of the Coal Act, which concerns "Rules relating to employment *and reassignment upon purchase*" (emphasis added), the Senate Leg. Draft did not include a provision addressing post-enactment successorship. Coal Act Section 9706(b)(2), however, specifically addresses the optional transfer by an assigned operator to a post-enactment successor, and, notably, not a "successor in interest."

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[14] The third assignment category, which the Court held unconstitutional in *Eastern Enterprises*, was also phrased differently, referring to the signatory operator who employed the retiree for a longer period of time than any other signatory operator "during all periods before 1978." Appendix 30a. The Coal Act instead includes the phrase "prior to the effective date of the 1978 coal wage agreement." 26 U.S.C. § 9706(a)(3).

## E. The passage of the Coal Act

The July 29, 1992 proposal subsequently was enacted as part of the Energy Policy Act of 1992, signed into law on October 24, 1992 without any change. No hearings were held on any of the July 29, 1992 provisions before the Coal Act became law. Whatever had occurred during the behind-the-scenes negotiations involving key senators and the White House in July 1992 established what would be the final statutory scheme.

The conference report associated with the Energy Policy Act contains no explanation of what was meant by any particular provision of the Coal Act.[15] The isolated statements which were entered into the Congressional Record concerning the Coal Act in October 1992 were not a part of the actual Energy Policy Act conference report, although various parties have been confused by the heading "Conference Report" that was associated with the "technical explanation" offered by Senator Wallop. *See* 138 Cong. Rec. S17604 (October 8, 1992). Despite this title, there is nothing in any of the legislative materials to indicate the status of this "technical explanation" is anything other than a statement entered into the record at the request of a member of Congress.

## SUMMARY OF ARGUMENT

The plain language of a statute notifies affected parties of both their rights and obligations. When interpreting the Coal Act, Respondent Jericol Mining, like R.G. Johnson, reasonably relied on the statute as written to support its refusal to take on the liability which the government now seeks to impose. The reasonableness of this view was enforced by the government's own actions. No notice was given that assignments would be made on the basis of a "successor in interest to a signatory operator" theory, and the

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[15] Attached at Appendix 40a-48a is the relevant portion of this conference report, similarly taken from the record in *R.G. Johnson*.



government was, in fact, was promoting the position of no such liability in 1995.

Without explaining the change in its position since it advocated a different view in *Eastern Enterprises*, the government now finds that Congress, by way of a tortured construction of a single provision of the Coal Act that ignores all others, meant Combined Fund liability to flow to a direct "successor in interest to a signatory operator." Absent any direct support in the Coal Act or otherwise, the government relies on legislative materials of dubious authority to provide an aura of respectability for this claim. The government asks the Court to look to this legislative gloss as being the end of the matter.

Even assuming that the Court were willing to embark on the course of statutory construction presently favored by the government, the government has failed to present anything but manifestly ambiguous support for its current views. Other sources belie the government's claim that Congress used a bizarre statutory construction to achieve what could have been done quite simply, if that is what Congress meant to do. Congress knew how to create the type of successor liability at issue here, and intentionally omitted it from the Coal Act. The government is attempting to create support where there is none.

The Fourth Circuit correctly concluded that the Respondents Sigmon, *et al.*, are not liable under the Coal Act. This is what Congress both said and meant. The court of appeals' decision should be affirmed.

## ARGUMENT

The essence of the government's position is that affected parties who rely on the plain language of a statute as the statement of the law, consistent with the normal rules of statutory interpretation, do so at their peril. Under the government's approach, the government can, at any point, reverse course and embrace a new, previously unannounced

view of what seemed a settled interpretation of the statute. Both the district court and the court of appeals in the case now before the Court refused to accept that this is the way statutory obligations are to be imposed. Instead, they relied on the plain language of the Coal Act and applied it as written. This Court is urged to affirm that this is what Congress intended.

## I. The government's new textual argument in support of its "successor in interest to a signatory operator" theory should be rejected as a proper basis for imposing liability under the Coal Act.

The lower courts have consistently rejected any contention that a literal interpretation of the statute leads to the liability of parties who have been identified by the government as "successors in interest to signatory operators." The courts found that the relevant definitions of "signatory operator" and "related person," 26 U.S.C. § 9701(c)(1) and (2), simply do not support this claim. The district court in R.G. Johnson's case, for example, characterized the argument in favor of literal statutory support as "entirely illogical" and based on a "tortured" reading of the "related person" definition. 994 F.Supp. at 14.

Even supposing that the government's current "plain meaning" textual argument has any viability, there can be no dispute that the government's interpretation is, by far, less plain than the more straightforward reading to the contrary adopted both by parties such as Jericol Mining and R.G. Johnson and all of the courts below. It requires three pages of exposition in the government's brief to reveal how the definition of "related person" encompasses a direct successor in interest to a signatory operator. Brief for the Petitioner at 23-26. The magnitude of this exercise alone demonstrates why affected parties might not have interpreted the statute in the way the government now favors. Given the additional fact that the textual basis for the government's view is convoluted, at best, it is entirely understandable that a potential "successor in interest to a signatory operator" would



conclude upon reading the statute that it was not covered by the plain language of the Coal Act. Nor would such parties have any cause to question their straightforward reading of the statute. Even assuming that potentially affected parties were privy to the essentially non-public developments behind the statute, and parties such as R.G. Johnson were not, they still had no reason to suspect that their reading of the statute was in error. Nothing in the Coal Commission's proceedings or the prior legislative proposals indicated that successorship liability of the sort at issue here was a possibility. The legislative proposals which preceded the Coal Act were based on completely different concepts – either continued payments to the then-existing UMWA Health and Retirement Funds or a tax on coal production – and did not anticipate the assigned operator approach to funding benefits that became the Coal Act.

Once the assignment system was in place, there was still no notice that this type of liability was in the offing. In the course of making assignments, the government never provided any notice (actual, constructive or otherwise) to R.G. Johnson or any other purported "successor in interest to a signatory operator" of potential liability. In fact, the position the government was taking before the district court in the Eastern Enterprises case as of April 1995 was to the contrary. There, the government explained the statutory basis for excluding successor liability as follows:

> Inclusion of successors in those provisions relating to related persons (§ 9701(c)(2)(A)) and reassignments upon purchase (§ 9706(b)(2)) clearly establishes both a Congressional awareness of successor company issues in the coal industry and a proficiency in expressly addressing such issues where deemed appropriate or necessary. Congress, therefore, must be presumed to have acted purposefully and intentionally when omitting successor language from the requirements of the

Coal Act's assignment hierarchy and definitional section for signatory operators.

Appendix at 4a. Consistent with the government's own position, parties such as Jericol and R.G. Johnson properly concluded that they are not covered by the language of the statute.

The government did not arrive at its "successor in interest to a signatory operator" theory until some time after endorsing a contrary view in *Eastern Enterprises*. The government has never explained why it eventually changed course and arrived at its current position. Imposing liability on affected parties under these circumstances is unjustifiable.

## II. The omission of the type of successor liability at issue in this case from the Coal Act was intentional.

While the equities favor rejection of the government's position, this is not the only flaw in the government's argument. The government's legal analysis rests on the claim that Congress either intended to include successor liability of the type at issue here or that it was a mistaken omission. However, the gloss which the government seeks to place on the indicia of Congressional intent should be rejected for the after-the-fact makeweight that it is. The exclusion of the type of successor liability at issue in this case was entirely intentional.

The government itself argued in the Eastern Enterprises case that Congress was aware of successor liability and chose to exclude it from both the definitional sections and the assignment sections of the Coal Act. To the extent that the government now seeks to look to legislative materials to justify a change of position, there is no reason to limit the search to the materials which the government cites.

Other sources belie the claim that Congress did not mean to exclude liability for a successor in interest to a signatory operator.



As discussed above, the critical events leading to passage of the Coal Act in its final form occurred in July 1992. As of July 27, 1992, the members of Congress who were actively involved in drafting the specific provisions which would become law were considering the Senate Leg. Counsel draft.[16] That draft precisely addressed signatory operator successorship by defining a signatory operator to include a direct successor. If this provision had been carried over into the Coal Act, there would have been no need to parse the "related person" definition to discover direct successor liability as the government now maintains. It would have been there by way of the definition of signatory operator.

This provision, along with the definition of "successor," was deleted before the July 29, 1992 version of the statute was introduced. Given the timeframe and the similarities between the Senate Leg. Counsel draft and the Coal Act, it is apparent that this was a deliberate deletion. Both the statement of policy and the vast majority of the language found in the Senate Leg. Counsel draft was carried over into the Coal Act. These limited provisions were not.

If nothing else, the inclusion and then subsequent exclusion of the successor provisions proves that Congress was aware of successor liability and knew how to include it by way of a simple statutory construction if it so chose. It did not so choose. The government's underlying premise that Congress could not have intended to exclude signatory operator successor liability is mistaken.

While there is no official record of the deliberations behind the exclusion, it is entirely reasonable to conclude that the desired result was the most obvious one – to delete signatory operator successor liability. At the same time that

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[16] The version of the statute which became law was a creation of the Senate. No changes were made during the subsequent conference with the House of Representatives. Accordingly, the critical parties were the involved members of the Senate.

the definitional successor provisions were deleted from the Senate Leg. Counsel draft, a new provision addressing post-enactment successorship was inserted. 26 U.S.C. § 9706(b)(2). Significantly, this provision left ultimate liability with the signatory, not its successor. Such a concept would have been at odds with a rule mandating successor liability coextensive with signatory liability.

It is also significant that the structure of the "related person" definition remained the same. If Congress had believed that the "related person" definition already included some aspect of signatory operator successorship liability, this would have been changed as well. The absence of a comparable change means that signatory operator successor liability was not there in the first place.

The July 1992 development of the Coal Act establishes that it was a carefully crafted compromise between competing interests. This compromise should be respected notwithstanding the government's current position. The Fourth Circuit correctly rejected the government's claims in favor of what the statute says and Congress intended.

## CONCLUSION

For the reasons stated above, R.G. Johnson urges the Court to affirm the decision below.

Respectfully submitted,

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Dated: July 24, 2001



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EASTERN ENTERPRISES,

*Plaintiff,* Case No. 93-12372WF

v.

SHIRLEY S. CHATER,
Commissioner of Social Security, et. al.,

*Defendants.*[1]

**FEDERAL DEFENDANT'S OPPOSITION TO EASTERN ENTERPRISES' MOTION FOR SUMMARY JUDGMENT ON STATUTORY INTERPRETATION CLAIMS**

## PRELIMINARY STATEMENT

Eastern Enterprises ("Eastern") asserts in its motion for summary judgment on statutory interpretation claims that federal defendant Secretary of Health and Human Services ("Secretary") improperly assigned beneficiaries to Eastern

[1] Pursuant to the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, the function of the Secretary of Health and Human Services in Social Security and related cases was transferred to the Commissioner of Social Security effective March 31, 1995. In accordance with Fed. R. Civ. P. 25(d) and § 106(d) of Pub. L. No. 103-296, Shirley S. Chater, Commissioner of Social Security, should be substituted for Donna E. Shalala, Secretary of Health and Human Services. Since plaintiff Eastern Enterprises' summary judgment memorandum (as well the parties' other submissions to date in this case) refer to the Secretary, rather than the Commissioner, as the party-federal defendant, the text of this memorandum for ease of reference will continue to refer to the federal defendant as "the Secretary."

under the Coal Industry Retiree Health Benefit Act of 1992 (codified at 26 U.S.C. §§ 9701-9722) ("Coal Act"). In summary, Eastern contends that the Social Security Administration ("SSA") improperly assigned beneficiaries to Eastern as a result of the agency's interpretation of the Coal Act which provides for beneficiary assignments to successor companies only when no other otherwise assignable company remains in business. Eastern asserts that

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predecessor signatory operator. *Id.*

Eastern's proffered view of successor assignments not only ignores the carefully-wrought legislative balance underlying the Coal Act's assignment provision, *see* discussion *infra* pp. 28-34, but also conflicts with the well-established principle of statutory construction holding that the plain language of a statute, absent extraordinary circumstances, is conclusive. *See, e.g. Negonsott v. Samuels*, -- U.S.--, 113 S. Ct. 1119, 1122-23 (1993) (" ' Our tasks is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, the language must ordinarily be regarded as conclusive.") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *In re Plaza de Diego Shopping Center, Inc.*, 911 F.2d 820, 827 (1st Cir. 1990) (" ' The plain purpose of legislation . . . is to be determined in the first instance with reference to the plain language of the statute itself.' ") (quoting *Board of Governors of the Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986)); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter: for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

The Coal Act's assignment hierarchy plainly does not require assignments to successor companies. Section 9706(a) of the Coal Act provides for Combined Fund beneficiary assignments to "signatory operators" (or, if that operator is no



longer in business, to any related person which remains in business) based on the miner's work history and the collective-bargaining experience of the signatory-operator. A signatory operator, in turn, is defined as "a person which is or was a signatory to a coal wage agreement." Coal Act § 9701(c)(1). Neither the Coal Act's assignment hierarchy, nor its definition of "signatory operators," thus make any reference, express or otherwise, to successor companies.

That Congress omitted successor companies from the Coal's Act's assignment provision, moreover, cannot be attributed (as Eastern suggests) to mere legislative inadvertence or neglect. *See* Pl. SJ Mem. at 2, 19. Given that the Coal Act refers to "successors" in several other Coal Act sections, Congress' omission of successors from both the requirements of the assignment hierarchy and the definition of "signatory operators" was clearly intentional. *See, e.g., Estate of Bell v. Commissioner of Internal Revenue Service*, 928 F.2d 901, 904 (9th Cir. 1991) ("Congress is presumed to act intentionally and purposely when it includes language in one section but omits it from another."); *United States v. Azeem*, 946 F.2d 13, 17 (2nd Cir. 1991); ("Not every congressional silence is pregnant . . . [i]n general, congressional consideration of an issue in one context, but no in another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated."); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir. 1989) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed Congress acted intentionally and purposely in excluding the particular language."), *cert. denied*, 492 U.S. 924 (1989).

The Coal Act refers to successor companies in two separate provisions. First, reference is made to "successors in interest" in the definitional section for related persons. Coal Act § 9701 (c) (2)(A). Section 9701(c) (2)(A) provides that a company is deemed to be "related" to a signatory operator, for purposes of the Coal Act, when that company is either (i) a

member of the same controlled group of corporations as the signatory operator, or (ii) in a trade or business which is under the common control of the signatory operator, (iii) in a partnership or joint venture with the signatory operator. Of particular relevance here, the concluding clause of this section also provides that "[a] related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii)." *Id.*[11]

Subsection 9706(b)(2) contains the Coal Act's second reference to successor companies. Captioned "Reassignment upon purchase," this subsection provides that, should a company become a successor of an assigned **operator after the enactment date of the Coal Act,** the assigned operator may transfer any assigned Combined Fund beneficiaries to the successor. *Id.* The assigned operator transferring the assignments, however, remains the guarantor of benefits to its originally assigned beneficiaries. *Id.* (Because Eastern sold its coal operations to EACC long before the Coal Act's enactment in 1992, section 9706(b)(2) has no application to the Eastern-EACC sale).

Congress' omission of successor language from the requirements of the assignment hierarchy contained in 9706(a) thus stands in stark contrast to the two other subsections of the Coal Act which expressly address successorship issues. Inclusion of successors in those provisions relating to related persons (§ 9701(c) (2)(A)) and reassignments upon purchase (§ 9706(b)(2)) clearly establishes both a congressional awareness of successor company issues in the coal industry and a proficiency in expressly addressing such issues where deemed appropriate or necessary. Congress, therefore, must be presumed to have acted purposefully and intentionally when omitting successor language from the requirements of the Coal Act's assignment

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[11] As a general matter, the Coal Act directs the taking of a corporate snapshot as of July 20, 1992 to determine whether or not a company is related to a signatory operator. *Id.* at 9701(c)(2)(B).



hierarchy and definitional section for signatory operators. *See e.g. United States v. Newman*, 982 F.2d 665, 673 (1st Cir. 1992), *cert. denied.* -- U.S. --, 114 S.Ct. 59 (1993).

Application of the plain language of the Coal Act to Eastern, in the final analysis, is also consistent with the overall framework of the Coal Act's assignment scheme. Far from leaving assigned operators without legal recourse should they have private contractual agreements with successors or other parties regarding responsibility for the payment of retiree health benefits, the Coal Act expressly provides for private indemnification actions irrespective of any beneficiary assignments made under the Act. Section 9706(f)(6) provides in full:

> Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Secretary.

While Eastern conveniently ignores this provision in its summary judgment memorandum, Eastern has already availed itself of this private right of action by filing a third-party complaint to this action, naming EACC and Peabody Holding Co., Inc. as third party defendants. *See Eastern Enterprises v. Peabody Holding Co., Inc.*, C.A. No. 93-12372-WF (filed Jan. 5, 1994). Thus, if Eastern's third-party...

* * * * *

(2) SSA Successor Policy Which Makes Assignments to Successor Companies Only When the Otherwise Assignable Signatory Operator (or Related Person) Is Out of Business Presents a Reasonable Interpretation of the Coal Act

While Eastern chides SSA for erecting an arbitrary "barrier" to successor assignments by implementing a policy

which requires that all otherwise assignable signatory operators (or related persons) be out of business before making assignments to successor companies, *see* Pl. SJ Mem. at 20-21, SSA's successor policy is both reasonable and consistent with the policies underlying the Coal Act.

As noted above, *see* discussion *supra* pp. 17-20, the Coal Act makes no express provision for assignments to successor companies. Thus, in conformance with the plain terms of the assignment hierarchy in § 9706(a) of the Coal Act. SSA first looks to in-business signatory operators (or their related persons) for Combined Fund beneficiary assignments. When no otherwise assignable signatories or related persons remain in business, the beneficiary, as a general matter, becomes an "orphan" beneficiary for whom all assigned operators bear a *pro rata* premium responsibility. Coal Act §§ 9704(d), 9706(a)(3). SSA's successor policy is intended to reduce the number of unassigned or "orphan" beneficiaries and thereby broaden the pool of assigned operators. In administering the Coal Act, SSA realized that some potentially inequitable results could arise in situations where, but for an assignment to a successor company, the beneficiary would be placed in the unassigned beneficiary pool. O'Connell Dec. ¶ 18.[16] Such potential inequities arise primarily because, while in-business signatory operators (such as Eastern) assigned responsibility for former employees may seek indemnification from a successor company by private action pursuant to § 9706(5), no such action could be maintained by (or on behalf of) unassigned beneficiaries. SSA therefore developed a

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[16] Such a situation is illustrated by the following example. Assume that both Company A and Company B are pre-1978 signatory operators, but neither of whom remained in business as of July 1992. Also assume that Company A has an active related company engaged in the candy business and Company B has an active successor company engaged in the coal business. Absent SSA's current successor policy, Company A's beneficiaries could be assigned to its related candy company, but Company B"s beneficiaries would have to be placed in the pool of unassigned beneficiaries. *See* O'Connell ¶ 18.



successor policy which looks to successor companies when all other otherwise assignable signatory operators or related persons are out of business on the grounds that, as between making an assignment to a successor company or placing a beneficiary in the unassigned beneficiary pool, Congress would have preferred successor assignments. *See* O'Connell Dec. ¶¶ 19.

SSA's successor policy, far from being arbitrary, not only remains true to the congressional policies underlying the Coal Act, but also serves the laudable purpose of reducing the overall number of orphan beneficiaries. SSA's succesor policy maintains a consistency with the overall structure of the Coal Act by treating successors similarly to related persons (a concept to which they are roughly equivalent) for purposes of making beneficiary assignments; neither related persons nor successors receive assignments; unless no former signatory employers remain in business. *See* Coal Act § 9706(a) O'Connell Dec. ¶ 16-17, 20, 22, *see also* 138 Cong. Rec. S17604 (daily ed. Oct 8, 1992) (describing Coal Act as "mak[ing] each . . . related person fully responsible for the signatroy operator's obligation should the signatory no longer be in business or otherwise fail to fulfill its obligations under the Act").

This policy, moreover, respects the congressional preference expressed in § 9706(a) for assignments to signatories and related persons by only looking to successor companies when no otherwise assignable entities remain in business. *See* 138 Cong. Rec. S17604 (noting that Act "intended to provide the greatest number of beneficiaries with health care benefits paid for by a company which remains in business and was the retiree's signatory employer, or is or was a person related to such signatory"); *see also* discussion infra pp. 33-34.

Finally, SSA's successors policy finds support in Congress' "overriding" concern for reducing the number of beneficiaries assigned to the pool of "orphan" beneficiaries. *See* 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992) ("Allocation of beneficiaries to an entity or business which

continues business is the basic statutory intent. Thus, the Conference Agreement's overriding purpose is to find and designate a specific obligor for as many beneficiaries in the [UMWA] Plans as possible."); *see also id.* at 17605 ("In recognition to the fact that unassigned beneficiaries were not employed by the assigned operators at the time of their retirement, provisions are made to subsidize the assigned

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DISTRICT OF COLUMBIA

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**AFFIDAVIT**

Before me, the undersigned authority, appeared HAROLD P. COXSON, JR., who, being duly sworn according to law, deposed and stated as follows:

1. I am an attorney in Washington, D.C., who since 1974 has represented employers in connection with federal labor and employment law matters, including matters relating to the coal industry, the United Mine Workers of America ("UMWA"), and the UMWA Health and Retirement Funds.

2. In July 1992, I was acting as chairman of the Collective Bargaining Alliance ("CBA"), an informal group of businesses that was monitoring legislative action concerning the UMWA Funds.

3. On behalf of the CBA, I obtained a document entitled "Subtitle C--Health Care of Coal Miners" from sources on Capitol Hill, attached hereto as Exhibit 1. I have confirmed that this document was prepared by the Senate Legislative Counsel, abbreviated "S.L.C." on the face of the document. It was circulated to interested members of CBA on or around July 27, 1992.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

December 8, 1997 — /s/Harold P. Coxson, Jr.
Date — Harold P. Coxson, Jr.

Subscribed and sworn to before me this 8th day of December, 1997.

/s/ Corina Fox McBride, Notary Public District of Columbia

## Subtitle C—Health Care of Coal Miners

### SEC. 1941. SHORT TITLE.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992"

### SEC. 1942. FINDINGS AND DECLARATION OF POLICY.

(a) FINDINGS.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest;

(2) an important element in the privately maintained benefit plans now experiencing financial difficulty has been the provision of health benefits for retirees of companies no longer contributing to the coal retiree health funds.;

(3) withdrawals of contributing employers from privately maintained benefit plans maintained under collective bargaining agreements and covering retirees in the coal industry have resulted in substantially increasing funding burdens for employers that continue to contribute to such plans, adversely affecting the stability of labor-management relations in the coal industry; and

(4) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) STATEMENT OF POLICY.—It is the policy of this subtitle—

(1) to remedy problems with the provision and funding of health care benefits with respect to the



beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

### SEC. 1943. COAL INDUSTRY HEALTH BENEFITS PROGRAM.

(a) In General.—The internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

## "Subtitle J—Coal Industry Health Benefits

"CHAPTER 99. COAL INDUSTRY HEALTH BENEFITS.

### "CHAPTER 99—COAL INDUSTRY HEALTH BENEFITS.

"SUBTITLE A—Definitions of general applicability.
"SUBTITLE B—Combined benefit fund.
"SUBTITLE C—Health benefits of certain other miners.
"SUBTITLE D—Other provisions.

"Subchapter A—Definitions of General Applicability.

"Sec. 9701. Definitions of general applicability.

### "SEC. 9701. DEFINITIONS OF GENERAL APPLICABILITY.

"(a) PLANS AND FUNDS.—For purposes of this chapter—

"(1) UMWA BENEFIT PLAN.—

"(A) IN GENERAL.—The term 'UMWA Benefit Plan' means a plan—

"(i) which is described in section 404(c), or a continuation thereof; and

"(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

"(B) 1950 UMWA BENEFIT PLAN.—The term '1950 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

"(C) 1974 UMWA BENEFIT PLAN.—The term '1974 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

"(2) 1950 UMWA PENSION PLAN.—The term '1950 UMWA Pension Plan' means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

"(3 1974 UMWA PENSION PLAN.—The term '1974' UMWA Pension Plan' means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

"(4) 1992 UMWA PENSION PLAN. —The term '1992 UMWA Benefit Plan' means the plan established under section 9713A.

"(5) COMBINED FUND.—The term 'Combined Fund' means the United Mine Workers of America Combined Benefit Fund established under section 9702.

"(b) AGREEMENTS.—For purposes of this section—

"(1) COAL WAGE AGREEMENT.—The term 'coal wage agreement' means—



"(A) the National Bituminous Coal Wage Agreement, or

"(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

"(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

"(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

"(2) SETTLORS.—The term 'settlors' means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the 'BCOA').

"(3) NATIONAL BITUMINOUS COAL WAGE AGREEMENT.—The term 'National Bituminous Coal Wage Agreement' means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

"(c) TERMS RELATING TO OPERATORS.—For purposes of this section—

"(1) SIGNATORY OPERATOR.—The term 'signatory operator' means—

"(A) a person which is or was a signatory to a coal wage agreement, or

"(B) in the event a person described in subparagraph (A) is no longer in business, any successor to such person.

"(2) 1988 AGREEMENT OPERATOR.—The term '1988 agreement operator' means—

"(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

"(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

"(C) an employer which, after 1987 and before the enactment date, made contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan [in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement].

"(3) LAST SIGNATORY OPERATOR.—The term 'last signatory operator' means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

"(4) ASSIGNED OPERATOR.—The term 'assigned operator' means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

"(5) RELATED PERSONS.—

"(A) IN GENERAL.—A person shall be considered to be a related person to a signatory operator if that person is—

"(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

"(ii) a trade or business which is under the same common control (as determined



under section 52(b)) as such signatory operator; or

["(iii) any other person who is identified by the Secretary of Health and Human Services as having an ownership or profit-sharing interest with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries.]

A related person shall also include a successor of any person described in clause (i), (ii), or (iii).

"(B) TIME FOR DETERMINATION.—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992 a signatory operator is no longer in business and has no successor, the relationships shall be determined as of the time immediately before such operator (or, if later, such successor) ceased to be in business.

"(6) OPERATORS OF DEPENDENT BENEFICIARIES.—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

"(7) BUSINESS.—For purposes of this chapter, a person shall be considered to be in business if such person or any related person conducts or derives revenue from any business activity, whether or not in the coal industry.

"(8) SUCCESSOR.—For purposes of this subsection, the term 'successor' has the meaning given such term when used in the National Labor Relations Act.

"(d) ENACTMENT DATE.—For purposes of this chapter, the term 'enactment date' means the date of the enactment of this chapter.

## "Subchapter B—Combined Benefit Fund

**"Part I—Establishment and Benefits**
**"Part II—Financing**
**"Part III—Enforcement**
**"Part IV—Other Provisions**

## "PART I—ESTABLISHMENT AND BENEFITS

**"Sec. 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.**

**"Sec. 9703. Plan benefits.**

### "Sec. 9702. ESTABLISHMENT OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND.

"(a) ESTABLISHMENT. —

"(1) IN GENERAL.—As soon as practicable (but not later than 60 days after the enactment date), the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall create a plan to be known as the United Mine Workers of America Combined Benefit Fund. The trustees of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall be the trustees of the Combined Fund until the appointment of trustees under subsection (b).

["(1) IN GENERAL. —As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create



a plan to be known as the United Mine Workers of America Combined Benefit Fund.]

"(2) MERGER OF RETIREE BENEFIT PLANS.—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and all assets and liabilities of such plans shall become part of the Combined Fund.

"(3) TREATMENT FOR ERISA.—The Combined Fund shall be—

"(A) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(B) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(4) TAX TREATMENT.—The Combined Fund and any related trust shall be exempt from tax under this title.

"(b) BOARD OF TRUSTEES.—

"(1) IN GENERAL.—As soon as practicable after the assignment of eligible beneficiaries under section 9706, and in no event later than November 1, 1993, [For purposes of subsection (a),] a new private plan board of trustees for the combined Fund shall be appointed as follows:

"(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

"(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

"(C) two individual designated by the United Mine Workers of America; and

"(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

"(2) SUCCESSOR TRUSTEES.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. [Any person designating a trustee shall have the right to remove such trustee.]

"(3) SPECIAL RULES.—

"(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be appointed by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

["(B) FORMER SIGNATORIES.—The initial trustee under paragraph (1)(B) shall be appointed by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA. Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.]

"(c) PLAN YEAR.—The first plan year of the Combined Fund shall begin February 1, 1993 and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

**"Sec. 9703. PLAN BENEFITS.**

"(a) IN GENERAL.—Each eligible beneficiary of the Combined Fund shall receive—

"(1) health benefits described in subsection (b), and

"(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).



"(b) HEALTH BENEFITS.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. Except as provided in paragraph (2)(B), coverage under the managed care system shall be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) PLAN PAYMENT RATES.—

"(A) IN GENERAL.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

"(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to the same health benefits; and

"(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

"(B) REDUCTIONS.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

"(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

"(ii) by the amount reserved for plan administration under subsection (d).

"(C) INCREASES.—The amount determined sunder subparagraph (A)(ii) shall be increased—

"(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

"(ii) by any carryover to the plan year from any preceding plan year which—

"(I) arises because payments form the Combined Fund for such preceding plan year were less than the limit under this paragraph, and

"(II) the trustees elect to use to pay benefits for the current plan year, and

"(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

["(3) COORDINATION WITH MEDICARE.—The level of coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992, shall be determined by taking into account any benefits or reimbursements provided under title XVIII of the Social Security Act.

"(4) QUALIFIED PROVIDERS.—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.]



"(5) EFFECTIVE DATE.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

"(c) DEATH BENEFITS COVERAGE.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, [on July 20, 1992.] Such coverage shall be provided on and after February 1, 1993.

"(2) TERMINATION OF COVERAGE.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

"(d) RESERVES FOR ADMINISTRATION.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

"(e) LIMITATION ON ENROLLMENT.—[Except as provided in section 9711(d) and 9712(c),] the Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this subchapter, the term 'eligible beneficiary' means an individual who—

"(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the

1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan. or

"(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

## PART II—FINANCING

**"Sec. 9704. Liability of assigned operators.**
**"Sec. 9705. Transfers.**
**"Sec. 9706. Assignment of eligible beneficiaries.**

### "SEC. 9704. LIABILITY OF ASSIGNED OPERAORS.

"(a) ANNUAL PREMIUMS.—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

"(1) the health benefit premium determined under subsection (b) for such plan year, plus

"(2) the death benefit premium determined under subsection (c) for such plan year, plus

"(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

"(b) HEALTH BENEFIT PREMIUM.—For purposes of this chapter—

"(1) IN GENERAL.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.



"(2) PER BENEFICIARY PREMIUM.—The Secretary of Health and Human Services shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of —

"(A) the amount determined by dividing—

"(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

"(ii) the number of such individuals, plus

"(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

"(c) DEATH BENEFIT PREMIUM.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

"(d) UNASSIGNED BENEFICIARIES PREMIUM.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

"(e) PREMIUM ACCOUNTS; ADJUSTMENTS.—

"(1) ACCOUNTS.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

"(2) ALLOCATIONS.—

"(A) ADMINISTRATIVE EXPENSES. — Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

"(B) INTEREST.—Interest shall be allocated to the account established for health benefit premiums.

"(3) SHORTFALLS AND SURPLUSES.—

"(A) In general.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account which is attributable to—

"(i) amounts described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits) for the plan year or any preceding plan year, or

"(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.



"(f) APPLICABLE PERCENTAGE.—For purposes of the section—

"(1) IN GENERAL.—The term 'applicable percentage' means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

"(2) ANNUAL ADJUSTMENTS.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

"(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

"(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators who ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

"(g) PAYMENT OF PREMIUMS.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, except as provided in subsection (i), the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

"(h) INFORMATION.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

"(i) TRANSITION RULES.—

"(1) 1988 AGREEMENT OPERATORS.—

"(A) 1ST YEAR COSTS.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreements operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year.

"(B) DEFICITS FROM MERGED PLANS.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

"(C) FAILURE.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

"(D) PREMIUM REDUCTIONS.—

"(i) 1ST YEAR PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount of premiums



under subsection (a) which are paid by assigned operators other than 1988 agreement operators for the plan year beginning February 1, 1993, and which are allocated to such operator under subparagraph (E).

"(ii) DEFICIT PAYMENTS.—In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of litigation based on the 'evergreen clause' found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan and which are allocated to such operator under subparagraph (E).

(iii) PLAN YEARS.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

"(E) ALLOCATIONS OF CONTRIBUTIONS AND REFUNDS.—Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D), shall be made ratably on the basis of aggregate contributions made under the applicable 1988 coal wage agreements.

"(2) 1ST PLAN YEAR.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

"(A) the premium under subsection (a)(1) shall be 67 percent of the premium without regard to this paragraph, and

"(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

**"SEC. 9705. TRANSFERS.**

"(a) TRANSFER OF ASSETS FROM 1950 UMWA PENSION PLAN. —

"(1) IN GENERAL.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

"(A) $70,000,000 on February 1, 1993,

"(B) $70,000,000 on October 1, 1993, and

"(C) $70,000,000 on October 1, 1994.

"(2) RESERVATION.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

"(3) USE OF FUNDS.—Amounts transferred to the Combined Fund under paragraph (1) shall—

"(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

"(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.



Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

"(4) TAX TREATMENT; VALIDITY OF TRANSFER. —

"(A) NO DEDUCTION.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

"(B) OTHER TAX PROVISIONS.—Any transfer pursuant to paragraph (1) —

"(i) shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

"(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA pension Plan.

"(5) TREATMENT OF TRANSfer.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines or penalties of any kind whatsoever.

"(b) TRANSFERS FROM ABANDONED MINE RECLAMATION FUND. —

"(1) IN GENERAL.—The Combined Fund shall include any amount transferred to the Fund under section

402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S. C. 1232(h)).

"(2) USE OF FUNDS.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

**"SEC. 9706. ASSIGNMENT OF ELIGIBLE BENEFICIARIES**

"(a) IN GENERAL.—For purposes of this chapter, the Secretary of Health and Human Services shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which is in business in the following order:

"(1) First, to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

"(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which —

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

"(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator during all periods before 1978.



"(b) RULES RELATING TO EMPLOYMENT.—For purposes of subsection (a) —

"(1) RELATED PERSON.—Any employment of a coal industry retiree in the coal industry by a related person with respect to a signatory operator shall be treated as employment by the operator.

"(2) CERTAIN EMPLOYMENT DISREGARDED.—

Employment with—

"(A) a person no longer in business, or

"(B) a person who has never been a signatory to a coal wage agreement,

shall not be taken into account.

"(c) IDENTIFICATION OF ELIGIBLE BENEFICIARIES.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Secretary of Health and Human Services a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

"(d) COOPERATION BY OTHER AGENCIES AND PERSONS.—

"(1) IN GENERAL.—The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Secretary of Health and Human Services in providing information which will enable the Secretary to carry out his responsibilities under this section.

"(2) PROVIDING OF INFORMATION. —

"(A) IN GENERAL.—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a request from the Secretary of Health and Human Services in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Secretary shall be advised whether the search disclosed the information and, if so, such information shall be promptly transmitted to the Secretary, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Secretary shall be so advised.

"(B) LIMITATION.—Any information provided under subparagraph (A) shall be limited to information necessary for the Secretary to carry out his duties under this section.

"(3) TRUSTEES.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, and the 1974 UMWA Benefit Plan shall fully and promptly cooperate with the Secretary in furnishing, or assisting the Secretary to obtain, any information the Secretary needs to carry out the Secretary's responsibilities under this section.

"(e) NOTICE BY SECRETARY. —

"(1) NOTICE TO FUND.—The Secretary of Health and Human Services shall advise the trustees of the Combined Fund of the name of each person identified under this section as an assigned operator, and the names



and social security account numbers of eligible beneficiaries with respect to whom he is identified.

"(2) OTHER NOTICE.—The Secretary of Health and Human Services shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section [and a brief explanation of the basis for such assignments].

"(f) RECONSIDERATION BY SECRETARY. —

"(1) IN GENERAL.—Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Secretary of Health and Human Services detailed information as to the basis of the assignment.

"(2) REVIEW.—An assigned operator may, within 15 days of receipt of the information under paragraph (1), request review of the assignment. The Secretary of Health and Human Services shall conduct such review if the Secretary finds the operator provided evidence with the request constituting a prima facie case of error.

"(3) RESULTS OF REVIEW.—

"(A) ERROR.—If the Secretary of Health and Human Services determines under a review under paragraph (2) that an assignment was in error—

"(i) the Secretary shall notify the assigned operator and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review the beneficiary's record for reassignment under subsection (a).

"(B) NO ERROR. —If the Secretary of Health and Human Services determines under a review conducted under paragraph (2) that no error occurred, the Secretary shall notify the assigned operator.

"(4) APPEALS. —

"(A) FINALITY.—Any determination by the Secretary of Health and Human Services under paragraph (2) or (3) shall be final.

"(B) COURT ACTION.—If a court overturns a determination by the Secretary of Health and Human Services under paragraph (3)(B) —

"(i) the trustees of the Combined Fund shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review beneficiary's record for reassignment under subsection (a).

"(5) PAYMENT PENDING REVIEW.—An assigned operator shall pay the premiums under section 9704 pending review by the Secretary of Health and Human Services or by a court under this subsection.

"(g) CONFIDENTIALITY OF INFORMATION.—Any person to which information is provided by the Secretary of Health and Human Services under this section shall not disclose such information except to the extent necessary for purposes of this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.



## "PART III—ENFORCEMENT

"Sec. 9707. Failure to pay premium

## "SEC. 9707. FAILURE TO PAY PREMIUM.

"(a) GENERAL RULE.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

"(b) AMOUNT OF PENALTY.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

"(c) NONCOMPLIANCE PERIOD.—For purposes of this section, the term 'noncompliance period' means, with respect to any failure to pay any premium or installment thereof, the period—

"(1) beginning on the due date for such premium or installment, and

"(2) ending on the date of payment of such premium or installment.

"(d) LIMITATIONS ON AMOUNT OF PENALTY. —

"(1) IN GENERAL.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

"(2) CORRECTIONS. —No penalty shall be imposed by subsection (a) on any failure if—

"(A) such failure was due to reasonable cause and not to willful neglect, and

"(B) such failure is corrected during the 30-day period beginning on the 1st date that any of the

persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

"(3) WAIVER.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

"(e) LIABILITY FOR PENALTY.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a),

"(f) TREATMENT.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

## "PART IV—OTHER PROVISIONS

"Sec. 9708. Effect on pending claims.

### "SEC. 9708. EFFECT ON PENDING CLAIMS.

"All liability for contributions that become due to the Combined Fund on and after February 1, 1993, shall be determined under this chapter. However, nothing in this chapter is intended to have any effect on any claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan before February 1, 1993, including claims based on the 'evergreen' clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan before February 1, 1993.



**1992 FUND**

**[TO BE SUPPLIED]**

(b) AMENDMENTS TO SURFACE MINING ACT. —

(1) EXTENSION OF FEE PROGRAM.—Section 402(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(b)) is amended by striking "September 30, 1995" and inserting "September 30, 2005".

[(1) EXTENSION OF FEE PROGRAM.—Section 402(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(b)) is amended by striking "September 30, 1995 and inserting "with the earlier of September 30, 2005, or the fiscal year following the first fiscal year for which there are no unassigned beneficiaries (within the meaning of section 9704(d) of the Internal Revenue Code of 1986) within the United Mine Workers of America Consolidated Benefit Fund established under section 9702 of such Code".]

(2) TRANSFER TO FUND.—Section 402 of such Act (30 U.S.C. 1232) is amended by adding at the end the following new subsection:

"(h) TRANSFER OF FUNDS TO COMBINED FUND. —

(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

"(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 for any fiscal year an amount equal to the sum of—

"(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

"(B) the amount by which the amount described in subparagraph (A) is less than $70,000,000.

"(3)(A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

"(B) The aggregate amount which may be transferred under paragraph (2)(B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund before October 1, 1985.

"(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year."

[(3) STUDY.—If, as of the close of any fiscal year, the Secretary of Health and Human Services determines that there are no unassigned beneficiaries in the United Mine Workers of America Combined Benefit Fund, the Secretary shall conduct a study and report to the Congress by the close of the following fiscal year as to

(A) the possibility of any future unassigned beneficiaries coming into the Combined Fund, and

(B) the necessity for continuing the fees under section 402(b) of the Surface Mining Control and Reclamation Act of 1977, including consideration of the effect of the Clean Air Act on the need for continuing such fees.]



(4) CONFORMING AMENDMENTS.—(A) Section 401(c) of such Act (30 U.S.C. 1231(c)) is amended by striking "and" at the end of paragraph (11), by redesignating paragraph (12) as paragraph (13), and by adding after paragraph (11) the following new paragraph:

"(12) for the purpose described in section 402(h); and",

(B) Section 402(g)(1) of such Act (30 U.S.C. 1232(g) is amended by striking "Moneys" and inserting "Except as provided in subsection (h), moneys"

102D CONGRESS 2d SESSION | HOUSE OF REPRESENTATIVES | REPORT 102-1018

# ENERGY POLICY ACT OF 1992

## CONFERENCE REPORT

TO ACCOMPANY

H.R. 776

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OCTOBER 5, 1992—Ordered to be printed

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59-693



ENERGY POLICY ACT OF 1992

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OCTOBER 5, 1992—Ordered to be printed

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Mr. DINGELL, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 776]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 776), to provide for improved energy efficiency, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

*SECTION 1. SHORT TITLE: TABLE OF CONTENTS.*

*(a) SHORT TITLE.—This Act may be cited as the "Energy Policy Act of 1992".*

*(b) TABLE OF CONTENTS.—*

*TITLE I—ENERGY EFFICIENCY*

*Subtitle A—Buildings*

*Sec. 101. Building energy efficiency standards.*
*Sec. 102. Residential energy efficiency ratings.*

*Sec.103 Energy efficient lighting and building centers*
*Sec. 104 Manufactured housing energy efficiency.*
*Sec. 105 Energy efficient mortgages.*
*Sec. 106 Energy efficient mortgages pilot program.*

*Subtitle B—Utilities*

*Sec. 111 Encouragement of investments in conservation and energy efficiency by electric utilities.*
*Sec. 112 Energy efficiency grants to State regulatory authorities.*
*Sec. 113 Tennessee Valley Authority least-cost planning program.*
*Sec. 114 Amendment of Hoover Power Plant Act.*

* * * * *

20.2056(b)-5(c)). Finding this regulation invalid, courts have held that the term "specific portion" includes a fixed dollar amount. See *Northeastern Pennsylvania National Bank & Trust Co. v. United States*, 387 U.S. 213 (1967); *Estate of Alexander v. Commissioner*, 82 T.C. 34 (1984), *aff'd*, No. 8401600 (4th Cir. April 3, 1985). Under the court holdings, appreciation in certain marital deduction property may be includible in neither spouse's estate.

*House bill*

No provision in H.R. 776. (However, H.R. 11 as passed by the House contains the same provision as included in the conference agreement described below).

*Senate amendment*

No provision in H.R. 776. (However, H.R. 11 as amended by the Senate contains the same provision as included in the conference agreement described below.

*Conference agreement*

The conference agreement provides that, for purposes of the marital deduction, a "specific portion" only includes a portion determined on a fractional or percentage basis. Thus,



a trust does not qualify under the exceptions to the terminable interest rule unless the required income interest and general power of appointment are expressed as a fraction or a percentage of the property.

It is intended that no inference be drawn from the provision with respect to the definition of "specific portion" under present law. The conference agreement does not generally affect the marital deduction allowed for a pecuniary formula marital deduction bequest. See, e.g., Rev. Proc. 64-19, 1964-1 C.B. 682.

*Effective date.*—The provision generally applies to gifts made, and decedents dying, after date of enactment. The provision does not apply to a transfer under a will or revocable trust executed before the date of enactment if either (1) on that date the decedent was under a mental disability to change the disposition of his property and did not regain his competence to dispose of such property before the date of death, or (2) the decedent dies within three years after the date of enactment. The provision applies, however, if the will or trust is amended after the date of enactment in any respect that increases the amount of the transfer qualifying for the marital deduction or alters the terms by which the interest passes.

## C. Health Benefits for Retired Coal Miners

*Present Law*

The United Mine Workers of America (UMWA) health and retirement funds were established in 1974 pursuant to an agreement between the UMWA and the Bituminous Coal Operator's Association (BCOA) to provide pension and health benefits to retired coal miners and their dependents. The funds have been maintained for this purpose through a series of collective bargaining agreements. The funds created in 1974 were a restructuring of the original benefit fund, which was established in 1946.

The funds consist of four different plans, each of which is funded through a separate trust. The 1950 Pension Plan provides retirement benefits to miners who retired on or before December 31, 1975, and their beneficiaries. The 1950 Benefit Plan provides health benefits for retired mine workers who receive pensions from the 1950 Pension Plan and their dependents. The 1974 Pension Plan provides retirement benefits to miners who retire after December 31, 1975, and their beneficiaries. The 1974 Benefit Plan provides health benefits to miners who retire after December 31, 1975. It also provides health benefits to miners whose last employers are no longer in business or, in some cases, no longer signatory to the applicable bargaining agreement. These miners are generally referred to as "orphan" retirees.

The Surface Mining Control and Reclamation Act of 1977, as amended, imposes a reclamation fee on coal mining operators, payable quarterly to the Secretary of the Interior for deposit in the Abandoned Mine Reclamation Fund (the AML Fund). The fee generally is the lesser of (1) 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mine or (2) 10 percent of the value of the coal at the mine. The fee for lignite is the lesser of 2 percent of the value of the coal at the mine or 10 cents per ton. The reclamation fee is scheduled to expire after September 30, 1195.

*House bill*

The House bill extends the abandoned mine reclamation fee through September 30, 2010.

*Effective Date*—Date of enactment.

*Senate amendment*

The Senate amendment provides that the 1950 Benefit Plan and the 1974 Benefit Plan are to be merged into a new UMWA Combined Benefit Fund ("Combined Fund") to provide health and death benefits for eligible retirees and their dependents. The Combined Fund is to be financed primarily



by health benefit premiums, death benefit premiums, and unassigned beneficiaries premiums imposed on assigned operators. The Combined Fund will receive additional funding from transfers from the 1950 Pension Plan and the AML Fund. The amendment also creates a 1992 Benefit Fund to provide benefits for persons not eligible under the Combined Fund.

The Senate amendment extends the abandoned mine reclamation fund fee through September 20, 2004.

*Conference agreement*

The conference agreement follows the Senate amendment.

### D. Trade Provision: Anticircumvention of Antidumping and Countervailing Duty Orders

*Present Law*

The Omnibus Trade and Competiveness Act of 1988 expanded antidumping and countervailing duty law to authorize the Department of Commerce to take action to address attempts to circum

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## LEGISLATIVE HISTORY

HOUSE REPORT NO. 102-474(I)

**House Conference Report No. 102-1018. Oct. 5. 1992**

**[To accompany H.R. 776]**

*No Senate Report was submitted with this legislation. The House Report (Parts I-IX (this page, 2064, 2182, 2201, 2210, 2232, 2271, 2282, 2422)) is set out below and the House Conference Report (page 2472) and the President's Signing Statement (page 2534-1) follow.*

## HOUSE REPORT NO. 102-474(I)

[page 1]

The committee on Energy and Commerce, to whom was referred the bill (H.R. 776) to provide for improved energy efficiency, having considered the same report favorable thereon with an amendment and recommend that the bill as amended do pass.

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